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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1958

No. 155

SOUTHWESTERN SUGAR AND MOLASSES CO., INC., PETITIONER,

vs.

RIVER TERMINALS CORPORATION.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 7, 1958
CERTIORARI GRANTED OCTOBER 13, 1958

SUPREME COURT OF THE UNITED STATES

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INDEX

	Original	Print
Record from the United States District Court for the Eastern District of Louisiana		
Libel	1	1
Answer	9	7
Interrogatories to be propounded to River Terminals Corporation	17	14
Answer of River Terminals Corporation to interrogatories	23	19
Supplemental answers of River Terminals Corporation to interrogatories	30	24
Amendment to libel	33	26
Order allowing amendment to libel	36	27
Answer to amended libel	37	27
Interrogatories propounded to libelant	40	29
Answer and exceptions to interrogatories	46	34
Request for admissions	52	39
Supplemental and amended answers to interrogatories	56	43

RECORD PRESS, PRINTERS, NEW YORK, N. Y., DECEMBER 1, 1958

Record from the United States District Court for the Eastern District of Louisiana—Continued	Original	Print
Letters annexed to foregoing supplemental and amended answers of libelant to interrogatories by respondent	61	46
Letter dated March 12, 1948 from Board of Underwriters of New York to John D., M. A. and Edwin H. Grace	61	46
Letter dated March 10, 1948 from John D., M. A. and Edwin H. Grace to Captain R. L. Wynne	62	47
Letter dated January 6, 1948 from R. L. Wynne, Chief Surveyor, to John D., M. A. and Edwin H. Grace	63	48
Letter dated December 30, 1947 from John D., M. A. and Edwin H. Grace to Captain R. L. Wynne	64	49
Letter dated December 26, 1947 from R. L. Wynne, Chief Surveyor, to John D., M. A. and Edwin H. Grace	65	50
Letter dated December 23, 1947 from John D., M. A. and Edwin H. Grace to Captain R. L. Wynne	66	51
Letter dated December 12, 1947 from John D., M. A. and Edwin H. Grace to Captain R. L. Wynne	67	51
Letter dated November 28, 1947 from Bencal & Lambdin to John D., M. A. and Edwin H. Grace	69	53
Letter dated November 24, 1947 from John D., M. A. and Edwin H. Grace to Bencal & Lambdin	70	54
Letter dated October 3, 1944 from Southwestern Sugar & Molasses Co., to Captain R. L. Wynne	71	55
Letter dated October 2, 1944 from Southwestern Sugar & Molasses Company to Capt. R. L. Wynne	73	56
Letter dated September 28, 1944 from Southwestern Sugar & Molasses Company to Capt. R. L. Wynne	74	57

	Original	Print
Record from the United States District Court for the Eastern District of Louisiana—Continued		
Letters annexed to foregoing supplemental and amended answers of libelant to interrogatories by respondent—Continued		
Letter dated September 28, 1944 from R. L. Wynne to Southwestern Sugar & Molasses Co.	75	58
Letter dated September 25, 1944 from Southwestern Sugar & Molasses Company to R. L. Wynne	76	59
Letter dated September 21, 1944 from R. L. Wynne to Southwestern Sugar & Molasses Company	77	59
Reply of libellant to request for admissions	78	60
Amended reply to request for admissions	80	61
Transcript of testimony	81	62
Appearances	81	62
Testimony of L. H. Frielier—		
direct	85	65
cross	144	103
redirect	152	109
recross	156	111
redirect	157	112
recross	158	113
Colloquy between Court and counsel	160	114
Testimony of Warda White—		
direct	165	117
cross	185	132
redirect	190	135
recross	192	137
Arthur Grant—		
direct	193	138
cross	202	143
redirect	220	156
recross	221	157
Offers in evidence by libellant	228	158
Offers in evidence by respondent	230	162
Colloquy between Court and counsel	239	166
Reporter's certificate (omitted in printing)	242	168

	Original	Print
Record from the United States District Court for the Eastern District of Louisiana—Continued		
Transcript of testimony—Continued		
Deposition of Joe E. Garcia—		
direct	242	168
cross	250	174
redirect	252	175
recross	253	176
Leroy C. Post—		
direct	255	177
cross	260	181
redirect	260	181
R. L. Wynne—		
direct	263	183
cross	277	194
redirect	282	198
recross	283	199
B. B. Lambdin—		
direct	284	199
cross	299	210
redirect	304	213
J. M. Stovall—		
direct	305	215
cross	311	219
redirect	313	220
Alphonse Allemand—		
direct	316	223
cross	322	227
redirect	330	233
recross	335	236
Exhibit "Allemand 1"—Statement of Alphonse Allemand, Master of Tug Dottie Dee, September 22, 1944"	337	238
Deposition of John S. Hinkle—		
direct	339	240
cross	342	242
redirect	346	244
recross	346	245
Exhibit Libellant 3—"Molasses pumped from the river tank at Reserve Refinery into the Barge Peter "B", September 16, 1944"	348	246

	Original	Print
Record from the United States District Court for the Eastern District of Louisiana—Continued		
Transcript of testimony—Continued		
Exhibit Libellant 4—"Day letter dated 9/17/44 from L. H. Frieler to A. I. Kaplan"	348	246
Exhibit Libellant 5—Report No. 6 of L. H. Frieler	349	247
Exhibit Respondent No. 1—Report No. 8 of L. H. Frieler	350	248
Exhibit Libellant 7—Letter dated Sept. 21, 1944 from R. L. Wynne to Southwestern Sugar & Molasses Co.	351	249
Exhibit Libellant 11—Letter dated September 26, 1944 from Southwestern Sugar & Molasses Co., to A. I. Kaplan	352	249
Exhibit Libellant 23—"Statement of John Therior, Pilot of the M/V Dottie Dee, which handled Barge Peter B from Port Arthur, Texas to Texas City, Texas"	353	251
Exhibit Wynne 2—Letter dated January 6, 1948 from R. L. Wynne to Messrs. John D., M. A. and Edwin H. Grace	354	252
Exhibit Wynne 3—Letter dated September 21, 1944 from R. L. Wynne to Southwestern Sugar & Molasses Co.	355	253
Exhibit Respondent 3—Unsigned letter dated June 17, 1952 to Edwin H. Grace	356	253
Exhibit Respondent 4—Letter dated June 20, 1952 from Edwin H. Grace to Selim B. Lemle	357	254
Interlocutory decree	358	255
Motion of respondent for a rehearing or a new trial and entry of a new interlocutory judgment	358	256
Hearing on motion for new trial, etc., and order denying same	359	256
Notice of appeal on behalf of River Terminals Corporation	360	257
Designation of contents by appellant	361	257
Assignment of errors	361	258

	Original	Print
Record from the United States District Court for the Eastern District of Louisiana—Continued		
Motion and order to send original exhibits to U. S. Court of Appeals	362	258
Clerk's certificate (omitted in printing)	365	260
Supplemental record from the United States District Court for the Eastern District of Louisiana	367	261
Findings of fact and conclusions of law	367	261
Clerk's certificate (omitted in printing)	377	268
Proceedings in the United States Court of Appeals for the Fifth Circuit	378	269
Argument and submission of case	378	269
Opinion, Tuttle, J.	379	269
Judgment	389	277
Motion for stay of mandate and order granting same (omitted in printing)	390	278
Clerk's certificate (omitted in printing)	393	278
Order granting certiorari	394	278

[fol. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA NEW ORLEANS DIVISION

No. 979 In Admiralty

Southwestern Sugar & Molasses Co.

versus

River Terminals Corporation.

Appearances:

Messrs. Lemle & Kelleher (Selim B. Lemle, Esq.), Proctors for Respondent-Appellant.

P. M. Flanagan, Esq., Amos E. Ponder, Jr., Esq., George Varian, Esq., Proctors for Libellant-Appellee.

Appeal from the District Court of the United States for the Eastern District of Louisiana, to the United States Court of Appeals for the Fifth Circuit, returnable within forty (40) days from the 21st day of February, 1957, at the City of New Orleans, Louisiana.

Extension of time granted by the Honorable United States District Court bring the return day up to and including May 22, 1957.

Libel—Filed September 22, 1945

[fol. 2] The Southwestern Sugar & Molasses Company exhibits this its libel against the River Terminals Corporation and in a cause of negligent towage, civil and maritime, articulately propounds as follows:

First: That at all of the times hereinafter mentioned libelant was and down to the present time still is a corporation organized and existing under and by virtue of the laws of the State of Texas with its principal place of business in Texas City, Texas.

Second: That at all of the times hereinafter mentioned the River Terminals Corporation was and down to the present time still is a corporation organized and existing under and by virtue of the laws of the State of Delaware with a place of business in Harvey, Louisiana, within the jurisdiction of this Honorable Court.

Third: That during the month of September, 1944, as well as long prior thereto, libelant was, and down to the present time, still is, the charterer and bailee of a certain steel barge designated as the Peter B under a contract between libelant and the International Transportation Corporation, its owner.

Fourth: That as shown by said contract, libelant, as charterer and bailee of said barge was required to keep the barge in repair, and at the termination of said charter party to return the barge to its owner in the same good order and condition as when received, ordinary wear and [fol. 3] tear excepted, and to pay for any damage sustained by said barge Peter B while used by the charterer under said charter party.

Fifth: That on September 24, 1944, libelant was the owner of 140,158 gallons of molasses which it had purchased from the Godchaux Sugars, Inc., Reserve, Louisiana for the sum of $26,104.43.

Sixth: That on September 16th, 1944, the aforesaid cargo of molasses was loaded on the said barge Peter B at the Godchaux Sugars, Inc., plant at Reserve, Louisiana, and to where the said barge Peter B had been towed by a tug owned and operated by respondent River Terminals Corporation under and pursuant to a certain verbal contract of towage made and entered into by and between the Southwestern Sugar & Molasses Company and the River Terminals Corporation.

Seventh: That on September 16, 1944, and in pursuance to the terms and conditions of the aforesaid verbal contract of towage respondent River Terminals Corporation also sent its tug DOTTIE D to tow the loaded barge to libelants' plant located at Texas City, Texas, the voyage

to be made by way of the Intracoastal Waterways and which voyage commenced on September 17, 1944, at 5:00 o'clock a.m.

Eighth: That during the aforesaid voyage of the said barge Peter B to Texas City in tow of the tug DOTTIE D or other tug or tugs used by respondent in the performance of this towage contract the officers and crew of the tug DOTTIE D or such other tug used by respondent as aforesaid were agents and employees of the River Terminals Corporation and at all times mentioned herein were [fol. 4] acting within the scope of their employment with said respondent.

Ninth: That under the aforesaid contract of towage the tug used in the performance of this voyage was to, and in fact did have, full and complete possession and control of the said barge Peter B and its cargo and over its navigation and safety. The barge Peter B was without steering gear, motive power or crew, or other representative of libelant on board.

Tenth: That at the time of the commencement of the aforesaid voyage the said barge Peter B was tight, staunch and strong, and in all respects seaworthy for said voyage and could by the exercise of proper care by those in charge of the tug employed to tow her, have been kept in that seaworthy condition during said voyage. However, through negligence of those in charge of said tug and barge Peter B she was allowed to become unseaworthy and with resulting damage as herein stated.

Eleventh: That during the aforesaid voyage from Reserve, Louisiana, those in charge of the navigation of the tug and barge Peter B as a result of gross inattention and neglect of duty permitted water to accumulate in the hull of said barge in such quantities as to cause said barge to gradually go down by the head until her freeboard forward was reduced from three feet at the time of the commencement of the voyage to a freeboard forward of only about an inch or two.

Twelfth: That as a result of the aforesaid gross negligence of those in charge of the barge Peter B in permitting

water to accumulate in the hull of said barge and greatly change the draft of said vessel water found its way into the cargo tanks of said barge resulting in the contamina-[fol. 5] tion and destruction of practically the entire cargo of molasses, and which loss and damage occurred even before the partial sinking of the said barge Peter B after arriving at her destination.

Thirteenth: That on September 23, 1944, at or about 5:00 A.M. the said barge Peter B arrived at Texas City, Texas, and where with her forward end level with the water the tug after tieing her up in the slip left her there without giving notice to anyone of the barge's arrival, or as to its then most dangerous and perilous condition and without taking any measures to remedy this condition.

Fourteenth: That on the following morning, September 24, 1944, the manager of the Southwestern Sugar & Molasses Company being absent from Texas City, a clerical employee of that company, having no experience with watercrafts was notified by an employee of the Southwestern Sugar & Molasses Company that the barge had arrived and was down by the head.

Fifteenth: That the aforesaid clerical employee then telephoned Hinkel an official of the River Terminals Company at Houston, Texas, and informed him as to the then condition of the barge. That Hinkel informed this employee of libelant that the captain of the tug that had towed the Peter B to Texas City was then in his office and that the captain had informed him that the barge was in no danger and that he had towed her in her then condition from Port Arthur, Texas to Texas City, Texas, its destination.

Sixteenth: That being assured as to the safety of the barge and as Saturday was not a work day libelant's employee left the barge in the condition in which she had been [fol. 6] assured by respondent that it was safe, down by the head, and its forward end level with the water.

The cargo of the barge and as planned before her arrival was to have been pumped out on the next day upon the arrival of the manager, and after having been surveyed

by an insurance surveyor to determine the extent of a small crack in the plate in No. 2 tank, and which occurred just before the commencement of the voyage from Reserve, Louisiana, but which did not in any way or to any extent affect the seaworthiness of the vessel and concerning which and through its qualified representative, Hinkel, the respondent was informed and well knew on September 18, 1944 or five days before the voyage in question ended.

Seventeenth: That at or about 6:00 a.m. on September 24, 1944, the barge Peter B sank by the head in 35 feet of water, the stern end of the barge remaining afloat.

Eighteenth: That the sinking of the barge and the consequent loss and damage herein referred to was occasioned solely and exclusively as a result of negligence of those in charge of the tug or tugs engaged in towing the barge Peter B in the following among other respects which will be shown on the trial hereof:

(1) The tug DOTTIE D or other tug used by respondent in the performance of this towage contract was not in charge of competent or experienced persons.

(2) That such parties were inattentive to their duty.

(3) That during said voyage and although it was evident that the barge was gradually going down by the head they failed and neglected to pump out the barge [fol. 7] as (sic) failed and neglected to pump out the barge as they were bound to do under the circumstances or to beach the barge in the proper performance of said contract.

(4) That upon arrival at Texas City with the barge Peter B in a then dangerous condition she was tied up in a slip in deep water and left there by the tug, whereas the dictates of good seamanship required that it should have been beached on a flat nearby and which could readily have been done and the consequent sinking and resulting loss have been thus avoided.

(5) That Hinkel acting for and on behalf of the respondent River Terminals Corporation negligently as-

sured Rita Wertenberger an employee of libelant that the barge Peter B in the condition it was as described to him was in a safe condition and which caused her to leave the Peter B in that condition resulting in the sinking of the barge as hereinmentioned.

Nineteenth: That in efforts to prevent the barge Peter B from sinking and in securing the raising and repair of said barge libelant incurred and paid the sum of Sixteen Thousand Six Hundred Thirty-one and 86/100 ($16,631.86) Dollars, details of which will be furnished on the trial hereof.

Twentieth: That as a result of the sinking of the barge Peter B and the negligence of the agents and employees of respondent in permitting the barge Peter B while in their [fol. 8] possession and control to settle by the head, her aforesaid cargo of the value of Twenty-six Thousand One Hundred Four and 43/100 ($26,104.43) Dollars became a total loss. The towage charge and which was paid under protest and in the sum of Twelve Hundred Forty-nine and 85/100 ($1249.85) Dollars and dockage charge of Fifteen ($15.00) Dollars was also lost to libelant, or a total loss as a result of the loss of cargo in the sum of Twenty Seven Thousand Three Hundred Sixty-nine and 28/100 ($27,369.28) Dollars.

Twenty-first: That as a result of the aforesaid negligence of respondent and in the sinking of the barge Peter B her raising and repair and in the loss of her cargo libelant sustained herein a loss in the sum of Forty-four thousand and 14/100 ($44,000.14) Dollars.

Twenty-second: That all and singular the premises are true and within the maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, the premises considered libelant prays that process issued herein according to the course of the courts of admiralty, and of this Honorable Court in case of admiralty and maritime jurisdiction, against the sair (sic) River Terminals Corporation, citing and admonishing the said

company, by and through its proper officer or agent to be and appear before this Honorable Court and answer upon oath all and singular the matters and after due proceeding had there be judgment in favor of libelant in the aforesaid sum of $44,000.14 together with 5% per annum interest thereon from September 24, 1944, until paid and that the River Terminals Corporation be condemned to [fol. 9] pay the same; and libelant prays for all such other further relief and redress in the premises, as in law and justice it may be entitled to receive and the court competent to grant,

Southwestern Sugar & Molasses Company, By s/ A. I. Kaplan, President.

s/ John D., M. A., & Edwin H. Grave, Proctors for libelant.

IN THE UNITED STATES DISTRICT COURT

ANSWER—Filed November 23, 1945

The answer of River Terminals Corporation to the libel of Southwestern Sugar & Molasses Company in a cause of negligent towage, civil and maritime, with respect represents:

1.

Respondent denies the allegations of the first article of the libel for want of information to justify a belief.

2.

Respondent admits the allegations of the second article of the libel.

3.

Respondent denies the allegations of the third article of the libel for want of information to justify a belief.

4.

Respondent denies the allegations of the fourth article of the libel for want of information to justify a belief.

5.

Respondent denies the allegations of the fifth article of the libel for want of information to justify a belief.

[fol. 10]

6.

For want of information to justify a belief, respondent denies that on September 16, 1944, the cargo of molasses referred to in the fifth and sixth articles of the libel, was loaded on the barge PETER B at Godchaux Sugars, Inc.'s plant at Reserve, Louisiana. Respondent admits the remaining allegations of the sixth article and avers that the contract of towage was on the basis hereinafter detailed in the twenty-fourth article hereof.

7.

Respondent admits the allegations of the seventh article of the libel and avers that the contract of towage was on the basis hereinafter detailed in the twenty-fourth article hereof.

8.

Respondent admits the allegations of the eighth article of the libel and avers that the contract of towage was on the basis hereinafter detailed in the twenty-fourth article hereof.

9.

Answering the ninth article of the libel, respondent admits that during the voyage the barge PETER B was without steering gear; motive power or crew, or other representative of libelant on board. The remaining allegations of the ninth article of the libel are conclusions of law which respondent avers it is not required to answer; alternatively, if respondent is required to answer the said allegations, then it denies the same.

[fol. 11]

10.

Respondent denies the allegations of the tenth article of the libel for want of information to justify a belief.

11.

Respondent denies the allegations of the eleventh article of the libel for want of information to justify a belief.

12.

Respondent denies the allegations of the twelfth article of the libel for want of information to justify a belief.

13.

Respondent admits that the barge PETER B arrived at Texas City, Texas on September 23, 1944, but at about 12:01 A.M. (Not 5:00 A.M.) and denies the remaining allegations of the thirteenth article of the libel for want of information to justify a belief.

14.

Respondent denies the allegations of the fourteenth article of the libel for want of information to justify a belief.

15.

Respondent denies the allegations of the fifteenth article of the libel for want of information to justify a belief.

16.

Respondent denies the allegations of the sixteenth article of the libel for want of information to justify a belief.

[fol. 12] 17.

Respondent admits that on September 24, 1944 the barge PETER B sank, but denies the remaining allegations of the seventeenth article of the libel for want of information to justify a belief.

18.

Respondent denies the allegations of the eighteenth article of the libel.

19.

Respondent denies the allegations of the nineteenth article of the libel for want of information to justify a belief.

20.

Respondent admits that libelant paid to it a towage charge of $1,249.85 for the towage of barge PETER B and its cargo and denies the remaining allegations of the twentieth article of the libel for want of information to justify a belief.

21.

Respondent denies the allegations of the twenty-first article of the libel for want of information to justify a belief.

22.

Respondent admits the maritime jurisdiction of the United States and of this Honorable Court, and denies that all and singular the premises of the libel are true.

23.

Respondent avers that Barge PETER B was furnished [fol. 13] by libelant for the transportation of a cargo of molasses from Reserve, Louisiana to Texas City, Texas; that the said Barge PETER B was not owned by libelant or by any carrier party to the tariff hereinafter mentioned in the twenty-fourth article hereof, and not leased or rented or operated under a per diem arrangement by any such carrier; and on information and belief, that the barge PETER B was furnished by a party other than a carrier party to the tariff hereinafter mentioned in the twenty-fourth article of the libel.

24.

Further answering, respondent avers that it is an interstate common carrier for hire by water, so certificated by the Interstate Commerce Commission and that as such interstate common carrier for hire by water, it has filed with

and there have been published by the Interstate Commerce Commission its tariffs, among which are tariffs providing its rates, rules and regulations, obligations and liabilities for the carriage of commodities, including the transportation of molasses in bulk from Reserve, Louisiana, a port on the Mississippi River, to Texas City, Texas, located on the Intracoastal Waterway System, in barges, not the property of or furnished by the carrier. Respondent avers that the transportation of the barge PETER B and its cargo to Reserve, Louisiana empty, and from Reserve, Louisiana to Texas City, Texas loaded, was performed pursuant to the provisions of its tariff I.C.C. No. A-9 as supplemented and amended, which provided the rate for the assessment of the transportation charges and contained the following provisions, among others:

[fol. 14] Item No. 180.

"Handling of Empty Barges Furnished by Parties Other Than Carriers For ties to This Tariff

"Except as otherwise provided in Tariff, rates named herein will include the movement of empty barges furnished by parties other than Carriers parties to this Tariff from point of discharge to point of interchange or from point of interchange to point of loading."

Item No. 580

"'Carriers' Non-Liability

. . . . . .

When shipments are transported in barges furnished by owners, shippers, consignees or parties other than the Carriers parties to this Tariff, such barges and (or) cargoes will be handled at owner's risk only, whether loss or damage is caused by negligence or otherwise."

. . . . . .

Item No. 640

"Furnishing of and Handling Barges

The Carriers parties to this Tariff will furnish open or closed type dry cargo barges, depending on character of material to be transported. TANK BARGES WILL NOT BE FURNISHED.

* * * * * * *

Presentation of a shipment in barge furnished by shipper, consignee or owner for movement on rates named herein shall constitute a guarantee to the Carriers parties to this Tariff that such barge is seaworthy and barge and cargo are in suitable condition for voyage in prospect. However, the Carriers parties to this Tariff, despite such implied guarantee, shall be privileged to refuse acceptance if the barge is in apparent bad order. If unfitness of barge or cargo is discovered after voyage has begun, then the Carriers parties to this Tariff shall be privileged to deliver such barge at nearest landing for holding at expense of shipper, consignee or owner in which event freight charges shall be adjusted in conformity with rates provided in this Tariff for distance barge was actually moved by the Carriers parties to this Tariff. If deficiencies are remedied by shipper in the judgment of the Carriers parties to this Tariff, shipper may reforward the barge [fol. 15] to ultimate destination at through rate applicable without additional charge for the stop over for repairs.

* * * * * * *

Respondent pleads all of the provisions of its applicable tariffs and makes them a part hereof the same as if they were copied herein, and without limiting the foregoing, more particularly those provisions of the said Tariff I.C.C. No. A-9 hereinabove quoted.

25.

Further answering, respondent avers on information and belief, that the barge PETER B, furnished by libelant for

the transportation of molasses on voyage from Reserve, Louisiana to Texas City, Texas, was old, dilapidated, with badly worn plates, defective valves, unseaworthy and unfit for the voyage for which it was furnished, conditions all of which respondent was ignorant of at the time it undertook to tow the barge on the voyage in question.

26.

Respondent avers that it delivered the barge to the consignee on or about the 23rd day of September, 1944, by tying it up at the wharf at the point designated for that purpose and in accordance with its, instructions, tariff provisions and prevailing custom; that the cargo compartments of the said barge were then full of molasses and it was unable to determine the condition of said compartments; that the compartments of the barge, other than the cargo carrying compartments, were dry and that when respondent's tug left the barge at the time and place afore- [fol. 16] said, after tying it up securedly, to the best of respondent's knowledge and belief the said barge was then in condition to remain afloat indefinitely with proper care by the consignee of the said barge. Respondent avers that after tying up the barge as aforesaid, its tug departed, that no representative of respondent was thereafter present, and that it does not know what occurred to the barge from the time its tug departed.

27.

Further answering, respondent avers that in tying up the barge as aforesaid, afloat and in apparent safe condition, it complied with all of its obligations under its contract of towage and that respondent is not responsible for any subsequent sinking of the barge, or loss of, or damage to its cargo.

Wherefore, respondent prays that the libel be dismissed at libelant's cost.

/s/ Lemle, Moreno & Lemle, Proctors for River Terminals Corporation, Respondent.

Duly sworn to by R. J. McGinity, jurat omitted in printing

[fol. 17]

IN UNITED STATES DISTRICT COURT

INTERROGATORIES TO BE PROPOUNDED TO RIVER TERMINALS CORPORATION—Filed April 23, 1946

Interrogatory No. I. Please give the name or names of the tug or tugs used by you in towing, as referred to in the libel herein, the barge Peter B from Godchaux Sugar Refinery at Reserve, Louisiana, to Texas City, Texas, and the following further information:

(a) The points between which the tug and/or tugs towed the barge Peter B.

(b) The day and hour at which the said towage commenced.

(c) The day and hour at which the barge Peter B arrived at Texas City.

(d) The route followed in towing the barge Peter B from Reserve, Louisiana, to Texas City, Texas.

Interrogatory No. II. Please state if the voyage referred to in the preceding interrogatory was made as a continuous voyage, or if there were any stops made during the [fol. 18] voyage at which the barge Peter B would have tied up or remained stationary for a period of two hours or more.

Interrogatory No. III. If in answer to interrogatory No. II you answer that such stops were made during the voyage, please state

(a) The place at which said stops were made.

(b) The number of such stops.

(c) The duration of each stop.

(d) The reason for each stop.

Interrogatory No. IV. Please state if the barge Peter B was towed alone during this entire voyage to Texas City, Texas.

Interrogatory No. V. If in answer to Interrogatory No. IV you state that other vessels were towed with the barge Peter B, then please give the following information:

(a) The name and size of the barge or barges so towed.

(b) Whether loaded or light.

(c) The place where each barge was taken in tow.

(d) The destination of said barge.

(e) The date of its arrival at its destination.

Interrogatory No. VI. Please state the approximate draft of the barge Peter B forward and aft when said tug took her away from the Godchaux Sugar Refinery at Reserve, Louisiana, at the commencement of the voyage in question.

Interrogatory No. VII. Please state the draft of the barge Peter B forward and aft when she passed through the various locks of this voyage from Reserve to Texas City and especially such draft when the barge passed through

[fol. 19] (a) ~~Harvey~~ Locks

(b) Vermillion Locks

Interrogatory No. VIII. Please give the day and hour on which the barge Peter B on the voyage in question passed through

(a) Harvey Locks and the name of the tug then towing her.

(b) Vermillion Locks and the name of the tug then towing her.

Interrogatory No. IX. Please give the approximate draft of the barge Peter B forward at the time she arrived at the slip at Texas City, Texas, and where she was tied up by the crew of the tug then towing her.

(a) The name of the tug then towing the barge Peter B, and

(b) The name and position of the man on which and then in charge of the navigation of said tug and barge Peter B.

Interrogatory No. X. Please state on how many occasions the syphons, or pumps of the tug and/or tugs that towed the barge Peter B to Texas City, and/or the pumps of the barge Peter B were used on said voyage in attempting to pump out or syphon out the barge Peter B.

Interrogatory No. XI. If in answer to the foregoing interrogatory you state that the syphons or pumps were so used to pump or syphon out the barge Peter B, then please state the draft forward and aft of the barge Peter B at the time said pumps and/or syphons were used.

(a) The approximate difference in the draft of the barge Peter B forward and aft on each occasion after the pumping or syphoning of said barge was discontinued.

[fol. 20] Interrogatory XII. If in answer to interrogatory No. X you state that at no time during the voyage in question were the syphons or pumps of the tug towing the barge Peter B or the pumps of the Peter B used in syphoning or pumping out the barge Peter B and if in answer to interrogatory No. VII you state that the barge Peter B was going down by the head explain fully why the tug's syphons or pumps or the barge's pumps were not then so used to correct this condition of the barge Peter B.

Interrogatory No. XIII. Please state if at the time of the commencement of the voyage, or during the voyage, or at the time of the termination thereof any inspection was made by either the masters, officers and/or crews of the tugs furnished to tow the barge Peter B on said voyage for the purpose of ascertaining the quantity of water if any in the rake space of said barge.

Interrogatory No. XIV. If you answer the foregoing interrogatory in the affirmative then please state:

(a) On how many occasions was such an inspection made.

(b) How made.

(c) The results of said inspection as to the quantity of water if any found in the rake compartment on each inspection.

Interrogatory No. XV. Please state if at the time and before the commencement of the voyage or during the said voyage, or at the termination thereof any inspection was made by either the masters, officers and/or crews of the tugs furnished to tow the Peter B on said voyage as to the quantity of molasses in each of her cargo tanks or rake space.

[fol. 21] Interrogatory No. XVI. If you answer the preceding interrogatory in the affirmative then please state:

(a) How, and on how many occasions such an inspection was made.

(b) Describe fully how said inspection was made.

(c) What was ascertained as to the quantity of liquid cargo in each of the barges cargo tanks, that is to say, as to whether they were one-quarter, one-third, one-half or full.

Interrogatory No. XVII. If in answer to the foregoing interrogatory you state that more than one such inspection was made of the cargo tanks, then please state if there were any changes in the quantity of liquid found in each of the tanks and/or rake compartments, and if so, what change was found.

Interrogatory No. XVIII. If in answer to the preceding interrogatory you state that during the voyage referred to in the libel the Peter B was going down by the head then please state if at any time, including the time of arrival and tying up if (sic) the barge Peter B at Texas City any inspection was made to ascertain:

(a) The condition of the hatches or manholes on the deck of the barge Peter B as to water lightness. (sic)

(b) As to the presence of any other openings on the deck of the barge Peter B.

Interrogatory No. XIX. If you answer the preceding interrogatory in the affirmative, then please state

(a). The result of said inspection and/or inspections.

Interrogatory No. XX. If you answer interrogatory XVIII in the negative then please explain fully

(a) Why such an inspection or inspections was not made.

[fol. 22] Interrogatory No. XXI. It is a fact, is it not, that on September 18, 1944, at or about 10:00 a.m. L. H. Frieler of the Southwestern Sugar & Molasses Co., went to Houston, Texas to and did then and there inform Mr. Hinkel, or representative of similar name, as to a small leak in the number 2 tank of said barge and which occurred just before the loading was completed:

(a) Was your said representative then advised as to the freeboard of the said barge when the loading was completed:

Interrogatory No. XXII. It is a fact, is it not, that Miss Warda Wertenberger on September 23, 1944, (some few hours after the arrival of the barge Peter B at Texas City, Texas), called your office on the long distance telephone and talked with your Mr. Stovall and informed him of the then condition of the barge Peter B.

Interrogatory No. XXIII. If you answer the preceding interrogatory in the affirmative then please state if it is not a fact that Miss Warda Wertenberger informed Mr. Stovall that water was then coming over one corner of the barge Peter B.

Interrogatory No. XXIV. It is a fact, is it not, that during this conversation Mr. Stovall interrupted same to talk as he stated he was talking, to the master of the tug that had left the barge Peter B at Texas City and had been informed by the master that the barge Peter B was in a safe condition.

(a) That he had towed her in that condition from Port Arthur, Texas to Texas City.

s/ John D., M. A. & Edwin H. Grace, Proctors for Libelant.

[fol. 23] April 22nd, 1946.

Services accepted with full reservation of all rights.

s/ Lemle, Moreno & Lemle, Proctors for Respondent.

IN UNITED STATES DISTRICT COURT

ANSWER OF RIVER TERMINALS CORPORATION TO INTERROGATORIES—Filed May 8, 1946

Now comes River Terminals Corporation, and in answer to the interrogatories propounded to it by Southwestern Sugar and Molasses Company, to be answered by it in writing under oath says:

I.

Tugs JOHN M., SAMBO, DOTTIE DEE.

(a) The barge PETER B. was towed from Reserve, Louisiana to Harvey, Louisiana, by the Tug JOHN M., from Harvey, Louisiana to Port Arthur, Texas by the Tug SAMBO; and from Port Arthur, Texas, to Texas City, Texas, by the Tug DOTTIE DEE.

[fol. 24] (b) 6:00 A.M., September 17, 1944.

(c) 12:01 A.M., September 23, 1944.

(d) Mississippi River from Reserve, Louisiana, to Harvey Locks at Harvey, Louisiana, through Harvey Locks, thence via Intracoastal Waterway regular route through Vermillion Locks to Port Arthur, Texas, thence to Galveston Bay, and through Galveston Bay to Texas City, Texas.

II.

The voyage referred to in Interrogatory No. I was not a continuous voyage, and stops were made during said voyage at which time the barge PETER B, was tied up or remained stationary for a period of more than two hours.

III.

(a) At Harvey, Louisiana, at Mile 243; at west of Harvey, Louisiana, or thereabouts; and at Port Arthur, Texas.

(b) Three (3).

(c) The duration of each stop was as follows:

At Harvey, Louisiana—1:05 P.M., September 17, 1944, to 12:10 A.M., September 18, 1944.

At Mile 234—2:30 A.M., September 21, 1944, to 10:10 A.M., September 21, 1944.

Port Arthur, Texas, at Mile 291 or thereabouts—8:30 P.M., September 21, 1944, to 11:15 A.M., September 22, 1944.

(d) The reason for each of the above stops was as follows:

[fol. 25] At Harvey, Louisiana—awaiting departure of west bound tug and tow.

At Mile 243—to dock Barge ABL 164 at Lake Charles, Louisiana.

At Mile 291 or thereabouts—to exchange tows with tug DOTTIE DEE.

IV.

No.

V.

Barge ABL 155, Dimensions: 175′ x 26′ x 10′8″

Barge ABL 164, Dimensions: 175′ x 26′ x 10′8″

Barge CTC 350, Dimensions: 175′ x 26′ x 11′

(b) Loaded

(c) The above barges were all taken into tow along with the Barge PETER B at Harvey, Louisiana.

(d) The destination of the above barges was as follows:

Barge ABL 155—Ivanhoe Canal, at Mile 132, west of Harvey, Louisiana or thereabouts.

Barge ABL 164—Lake Charles, Louisiana.

Barge CTC 350—At Mile 290, west of Harvey, Louisiana, or thereabouts.

(e) The dates of the above barges' arrival at their destination are as follows:

Barge ABL 155—September 19, 1944

Barge ABL 164—September 21, 1944

Barge CTC 350—September 21, 1944

VI.

The River Terminals Corporation has no information [fol. 26] from which it can reply to this interrogatory.

VII.

The River Terminals Corporation has no information from which it can reply to any part of this interrogatory.

VIII.

(a) Barge PETER B was towed from Reserve, Louisiana, to Harvey, Louisiana, by the tug JOHN M. which is not owned by the River Terminals Corporation, and the River Terminals Corporation does not have any records pertaining to the voyage; however, the Barge PETER B arrived at Harvey, Louisiana, at 1:05 P.M., September 17, 1944, and should have passed through the Harvey Locks within the hour prior to its arrival at Harvey, Louisiana.

(b) 2:20 A.M., September 20, 1944: Tug SAMBO.

IX.

The River Terminals Corporation has no information from which it can state to the draft of the Barge PETER B on her arrival at Texas City, Texas. She was tied up at the wharf designated by the Southwestern Sugar & Molasses Company.

(a) Tug DOTTIE DEE.

(b) (Objection filed hereto and not answered).

X.

The River Terminals Corporation has no record which covers the towage of the Barge PETER B from Reserve,

Louisiana, to Harvey, Louisiana. The records of the River Terminals Corporation covering the voyage from Harvey, Louisiana, to Texas City, Texas, do not show that the Barge PETER B was either pumped or syphoned during this voyage.

[fol. 27]

XI.

In view of the negative answer to Interrogatory X, answers to Interrogatories XI and XI (a) are not required.

XII.

As River Terminals Corporation has no information which indicates that Barge PETER B was going down by the head, an answer to this interrogatory is not required.

XIII.

According to the information in the possession of River Terminals Corporation, inspections were made of the rake compartments of the Barge PETER B when it was taken in tow by the Tug DOTTIE DEE at Port Arthur, Texas, and also just before tying it up at Texas City, Texas, that no liquid was found in her rake compartments at either time. The River Terminals Corporation has no information from which it can state whether or not another inspection was made.

XIV.

(a) At least two (2).

(b) Have no information.

(c) No water was found in the rake compartment of the Barge PETER B upon either inspection referred to in the answer to Interrogatory XIII.

XIV. (sic)

The River Terminals Corporation has no information whether any inspection was made at any time of the Barge PETER B's cargo compartments. The inspection of the PETER B's rake compartments, as stated in the answer to Interrogatory XIII disclosed that there was no liquid in

[fol. 28] either rake compartment, neither water nor molasses.

XVI.

As River Terminals Corporation has no information on which to base an answer to Interrogatory XV, an answer to this interrogatory is not required.

XVII.

As preceeding (sic) interrogatory is not answered, no answer to this interrogatory is required.

XVIII.

River Terminals Corporation has no information which indicates the Barge PETER B. was going down by the head and accordingly an answer to this interrogatory (all parts) is not required.

XIX.

As River Terminals Corporation is not answering the preceeding (sic) interrogatory, no answer is required to this interrogatory.

XX.

As River Terminals Corporation has no information which indicates Barge PETER B was going down by the head, it is impossible to formulate an answer to this interrogatory.

Interrogatories XXI to XXIV inclusive (all parts) have been objected to and are not answered.

River Terminals Corporation, By: s/ R. J. McGinity, Vice-President.

s/ Lemle Moreno & Lemle, Proctors for River Terminals Corporation, Respondent.

[fol. 29] Service accepted.

s/ John D., M. A., Edwin H. Grace, Proctors for Southwestern Sugar & Molasses Company, Libelant.

Duly sworn to by R. J. McGinity, jurat omitted in printing.

[fol. 30]

IN UNITED STATES DISTRICT COURT

SUPPLEMENTAL ANSWERS OF RIVER TERMINALS CORPORATION TO INTERROGATORIES—Filed May 24, 1946

Now comes River Terminals Corporation and pursuant to the order of this Honorable Court dated May 15, 1946, overruling its exceptions to Interrogatories IX (b); XXI, XXI (a), XXII, XXIII, XXIV and XXIV (a) and requiring it to answer said interrogatories, says:

Answer to Interrogatory IX (b)

Alphonse Allemand, master of the Tug DOTTIE D.

River Terminals Corporation avers that there was no corporate officer present at the conversations referred to in Interrogatories XXI, XXI (a), XXII, XXIII, XXIV and XXIV (a), and that its answers to the said interrogatories are based on hearsay, and for answer to said interrogatories it says:

[fol. 31] Answer to Interrogatory XXI

It is not informed as to the reason why Mr. L. H. Frieler went to Houston, Texas. Mr. Frieler did have a conversation with Mr. Hinkle in which he informed him that a small leak had developed in No. 2 tank of the barge at sometime prior to the completion of loading and enlisted Mr. Hinkle's aid in ascertaining if any tug which had towed the barge to Reserve had been in an accident. That was the sole purpose of the conversation.

(a) No.

Answer to Interrogatory XXII

On September 23, 1944 at 8:45 A.M., Mr. Stovall in his office at Houston, Texas, received a long distance telephone call from Miss Wertenberger, who was then at Texas City, Texas. She told him that the barge was on an uneven keel further down by the head than it was by the stern. He suggested to her to have the barge discharged. She replied that Mr. Frieler was absent and that he, Mr. Frieler, had

instructed her not to have the barge discharged in his absence, and to have Mr. R. L. Winn, a marine surveyor, look after the barge, but that she could not locate him at that time. Mr. Stovall then inquired of the tug master, who was in the office, what condition the barge was in and was informed by the tug master that there had been no water in the forward rake of the barge when he tied it up, but that the barge was listing forward. Mr. Stovall then told Miss Wertenberger that he said no immediate danger of the barge sinking, but that she should continue [fol. 32] to observe the condition of the barge and suggested she have it unloaded as promptly as possible.

Answer to Interrogatory XXIII

No. Not in the conversation of September 23rd.

Answer to Interrogatory XXIV

During the telephone conversation between Mr. Stovall and Miss Wertenberger, which began at approximately 8:45 A.M., September 23rd, Mr. Stovall interrupted the same to talk to the tug master as recited in the answer to Interrogatory XXII. It is not a fact that Mr. Stovall ever advised Miss Wertenberger that the barge was in a safe condition but on the contrary, he suggested unloading the barge and advised her in the telephone conversation on September 23rd to continue to observe the condition of the barge.

(a) No. It was never brought up in the telephone conversation what condition the barge was in while being towed.

River Terminals Corporation, By: s/ R. J. McGinity, Vice President.

s/ Lemle Moreno & Lemle, Proctors for River Terminals Corporation, Respondent.

Service Accepted:

s/ John D., M. A. & Edwin H. Grace, Proctors for Southwestern Sugar & Molasses Company, Libelant.

Duly sworn to by R. J. McGinity, jurat omitted in printing.

[fols. 33-34]

IN UNITED STATES DISTRICT COURT

AMENDMENT TO LIBEL—Filed April 5, 1948

Now comes the Southwestern Sugar & Molasses Company, libelant, with leave of court first obtained, and amends and supplements its libel, by adding the following allegations of fact:

First: That the molasses was loaded on the said barge Peter B at the plant of Godchaux Sugars, Inc., at Reserve, Louisiana, in good order and condition and respondent [fol. 35] accepted the same for delivery to libelant at Texas City, Texas.

Second: That respondent accepted delivery of the said merchandise and agreed and undertook to transport and deliver the same on the said barge Peter B to libelant at the port of Texas City, Texas, in the same good order and condition as when received, under the terms and conditions of a certain bill of lading issued to libelant by respondent, dated at Reserve, Louisiana, September 17, 1944. An enlarged photostat of the bill of lading is filed herewith and made part hereof, and marked Exhibit A, and your libelant begs leave to refer to said original bill of lading for all the terms and conditions and provisions therein contained as though the same were herein fully and at large set forth.

Third: Respondent failed to deliver the said molasses in like good order and condition as when received, but, on the contrary, the total amount of said merchandise was lost as alleged in the original libel herein.

Wherefore, the libelant, in addition to the allegations set forth in its original libel prays that the additional averment may be added to and included in its original claim, and it further prays as in its original libel it has already prayed.

s/ John D., M. A. & Edwin H. Grace, Proctors for Libelant.

Duly sworn to by Edwin H. Grace, jurat omitted in printing.

[fol. 36]

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING AMENDMENT TO LIBEL—April 5, 1948

Let the foregoing amendment to the libel herein be filed as prayed for, and let Lemle, Moreno & Lemle, proctors of record for respondent be served with copy thereof.

s/ Herbert W. Christenberry, United States District Judge.

April 5, 1948.

[fol. 37]

IN UNITED STATES DISTRICT COURT

ANSWER—Filed June 1, 1948

The answer of River Terminals Corporation to the amended libel of Southwestern Sugar and Molasses Co., with respect represents:

I

Respondent admits that a cargo said to be molasses was loaded on the Barge PETER B at the plant of Godchaux Sugars, Inc. at Reserve, Louisiana, and respondent accepted the barge and its cargo for towage to libelant's plant at Texas City, Texas, but respondent denies all of the remaining allegations of Article I of the amended libel for want of information sufficient to justify a belief.

Further answering the allegations of Article I of the amended libel, respondent avers that the cargo said to have been molasses was loaded on the Barge PETER B at the plant of Godchaux Sugars, Inc. by libelant and there tendered to respondent for towage to libelant's plant at Texas City, Texas; that Respondent issued therefor its bill of lading referred to in Article II of the amended libel; that said bill of lading is endorsed "Shipper's Load and Weight"; and respondent has no knowledge whatsoever as to the character, kind, quality, condition or quantity of the commodity which libelant loaded into Barge PETER B as aforesaid.

II

Respondent admits the issuance of the bill of lading referred to in Article II of the amended libel and admits that it accepted delivery of the barge PETER B with a [fol. 38] liquid cargo thereon, loaded and delivered to respondent as detailed hereinabove in Article I, and that it undertook to tow the barge with its cargo from Reserve, Louisiana and deliver it to libelant's wharf at Texas City, Texas; but respondent denies the remaining allegations of Article II of the amended libel for want of information sufficient to justify a belief, and particularly that the cargo on Barge PETER B was in good order and condition. Respondent further denies that the terms and conditions of the bill of lading which it issued exclusively governed the towage of the Barge PETER B and its cargo from Reserve, Louisiana to Texas City, Texas, and further answering Article II of the amended libel, respondent reiterates all of the allegations contained in the 24th article of its answer to the original libel.

III

Respondent denies the allegations of Article III of the amended libel for want of information sufficient to justify a belief, and alleges on information and belief that it delivered the cargo loaded in Barge PETER B in the same order and condition as when received by it at Reserve, Louisiana.

Further answering Article III of the amended libel, respondent pleads particularly Item No. 895 (g) of Tariff I.C.C. No. A-9:

> "Actual Placement—Actual placement of barge or barges is delivery of the barge or barges by the carrier to the point of loading or unloading designated by Shipper, consignee or their agents."

Respondent avers that upon placement of the Barge [fol. 39] PETER B at libelant's wharf, delivery of the barge and its cargo had been completed.

IV

Further answering, respondent avers that the cause of any loss of or damage to the Barge PETER B and its cargo was caused proximately by libelant's failure to properly care for the Barge PETER B and its cargo after the delivery thereof at libelant's wharf at Texas City.

Wherefore, respondent prays that the libel as amended be dismissed at libelant's costs.

s/ Lemle, Moreno & Lemle, Proctors for River Terminals Corporation, Respondent.

Duly sworn to by R. J. McGinity, jurat omitted in printing.

[fol. 40]

IN UNITED STATES DISTRICT COURT

INTERROGATORIES PROPOUNDED TO LIBELANT—
Filed September 14, 1950

1. Is not the Barge PETER B, so designated by Southwestern Sugar & Molasses Company, the same vessel as Barge ABL 109, which was a documented vessel of the United States, Official No. 175,116?

2. Is it not a fact that the Southwestern Sugar & Molasses Company owned Barge ABL 109, Official No. 175,116, having acquired the barge from Petroleum Carrier Corporation on or about the first day of September, 1942? If your answer is in the affirmative then

(a) State the name, address and capacity of each individual who has possession, custody or control of the bill of sale of the vessel, and

(b) Attach a copy or a photostat of the bill of sale to your answer.

3. When and where and by whom was ABL 109, Official No. 186,115 (sic) constructed and for whom?

(a) State the name, address and capacity of each individual who has possession, custody or control of the original construction plans for ABL 109, Official No. 175,116?

(b) Attach a copy, a blue-print, or a photostat of the plans of the original construction of ABL 109, Official No. 175,116.

4. (a) What type of barge was ABL 109, Official No. 175,116 when Southwestern Sugar & Molasses Company acquired it on or about September 1, 1942?

[fol. 41] (b) Into what type of barge did Southwestern Sugar & Molasses Company convert ABL 109, Official No. 175,116?

(c) What is the name and address of the surveyor Southwestern Sugar & Molasses Company employed or retained to make recommendations for the conversion of the barge and/or supervise the conversion?

(d) Were the surveyors' recommendations verbal or in writing?

(e) If the surveyors' recommendations were verbal, state in detail what they were.

(f) If the surveyors' recommendations were in writing, then state the name, address and capacity of each individual who has possession, custody or control of those recommendations and attach a copy or a photostat of those recommendations to your answer.

(g) Were any plans and/or specifications prepared for the conversion and if so state the name, address and capacity of each individual who has possession, custody or control of the plans.

(h) Annex copy of blue-print or photostat of the plans and/or specifications for the conversion to your answer.

(i) What shipyard or contractor carried out the conversion of the barge?

(j) Were all of the recommendations of the surveyor for the conversion of the barge carried out and if not what ones were comitted? (sic)

5. (a) Did the Southwestern Sugar & Molasses Company propose to convert Barge ABL 109, Official No. [fol. 42] 175,116, into a bulk petroleum carrier?

(b) If your answer is in the affirmative, tell why this was not done.

(c) Was an application made to the United States Coast Guard to issue a certificate to barge ABL 109, Official No. 175,116 for the carriage of petroleum products in bulk?

(d) If your answer is in the affirmative, then state the name, address and capacity of each individual who has possession, custody and control of the application to the Coast Guard and of the Coast Guard's reply and attach a copy of each to your answer.

6. (a) When and to whom and for what price did the Southwestern Sugar & Molasses Company first sell Barge ABL 109, Official No. 175,116?

(b) Isn't it a fact that Barge ABL 109, Official No. 175,116 was sold by Southwestern Sugar & Molasses Company to International Transportation Corporation on or about the 29th day of March, 1944?

(c) If your answer is in the affirmative then state the name, address and capacity of each individual who has possession, custody and control of the bill of sale from Southwestern Sugar & Molasses Company to International Transportation Corporation and attach a copy or a photostat of the bill of sale to your answer.

7. What was the relationship between Southwestern Sugar & Molasses Company and International Transportation Corporation? Please make a full disclosure as to stock ownership, directorate and officers of the two cor- [fol. 43] porations as of March 29, 1944 and September 24, 1944.

8. (a) Did the Southwestern Sugar & Molasses Company reacquire Barge ABL 109, Official No. 175,116 from International Transportation Corporation?

(b) If your answer is in the affirmative, then state the name, address, and capacity of each individual who has

possession, custody and control of the bill of sale and attach a copy or a photostat of the bill of sale to your answer.

(c) What was the relationship between Southwestern Sugar & Molasses Company and International Transportation Corporation on the date of such sale? Please make a full disclosure as to stock ownership, directorate and officers of the two corporations as of such date.

(d) To whom and when and for what price did the Southwestern Sugar & Molasses Company next sell Barge ABL 109, Official No. 175,116?

(e) State the name of each individual who has possession, custody or control of this bill of sale of the barge and attach a copy or a photostat of this bill of sale to your answer.

9. It is alleged in your libel that Southwestern Sugar & Molasses Company was the charterer and bailee of Barge PETER B during the month of September, 1944. Please state whether this charter party was oral or in writing. If oral then state the contents of the charter party in detail. If in writing state the name of each individual who has possession, custody, or control of the charter party and attach a copy or photostat to your answer.

[fol. 44] 10. State the name, address and capacity of each individual who has possession, custody or control of the plan or plans of Barge PETER B as she existed on September 17, 1944, including, without limitation, plan of the piping of barge and the control valves on such piping. Attach a copy or photostat of such plan or plans to your answer.

11. When last prior to September 17, 1944, was the Barge PETER B on drydock; on what drydock, and for what purpose?

12. When prior to September 17, 1944 was the Barge PETER B last on drydock for general overhauling and reconditioning; on what drydock and what did the reconditioning consist of, and what was its cost?

13. Please state the names and addresses of each surveyor who visited, saw, or surveyed the Barge PETER B

for any purpose during the six months period prior to September 17, 1944.

14. (a) State the names and addresses of any and all surveyors who visited, saw, or surveyed the Barge PETER B and/or its cargo after the barge was placed by respondent at the Southwestern Sugar & Molasses Company's wharf at Texas City, Texas, on September 23, 1944 and for ninety (90) days thereafter, including, without limitation, surveyors for International Transportation Corporation, Southwestern Sugar & Molasses Company, and for the hull underwriters and the cargo underwriters.

(b) State for whose account these surveyors acted and for whose account the survey or surveys were made.

(c) State the name, address and capacity of each of the individuals who has possession, custody or control of any [fol. 45] and all survey reports made by the surveyors set forth in your answer to interrogatory No. 14 (a) and attach to your answer copies of any and all survey reports made by these surveyors.

15. State whether or not Southwestern Sugar & Molasses Company and International Transportation Corporation or any of their officers, representatives, agents or employees had any correspondence with any of the surveyors named in your answer to interrogatory 14 (a).

(a) If your answer is in the affirmative, state in detail the nature of said correspondence.

(b) If your answer is in the affirmative, state the name, address and capacity of each individual who has possession, custody or control of said correspondence, and attach copies of said correspondence to your answer.

16. State whether or not Southwestern Sugar & Molasses Company or International Transportation Corporation, or any of their officers, representatives, agents, or employees had any correspondence with the hull and/or cargo underwriters and/or their representatives of Barge PETER B dealing with the cause and/or the extent of the damage to Barge PETER B and/or its cargo.

(a) If your answer is in the affirmative, state the name, address, and capacity of each individual who has possession, custody, or control of said correspondence and annex a copy of said correspondence to your answer.

17. Please state the names, addresses, and capacities of each and every witness whose testimony has not already [fol. 46] been taken by deposition in this case and whose testimony you will take in support of libellant's case, and state the nature of the testimony which will be elicited from those witnesses.

Lemle, Moreno & Lemle, By: s/ Selim B. Lemle,
Proctors for Respondent.

New Orleans, La.
September 1950

Service accepted; all rights reserved.

John D., M.A. and Edwin H. Grace, By: s/ Edwin H. Grace, Proctors for Libellant.

In United States District Court

Answer and Exceptions to Interrogatories—
Filed November 6, 1950

1. In answer to interrogatory 1, libelant answers in the affirmative.

2. In answer to interrogatory 2, libelant says it acquired the barge from Petroleum Carrier Corporation, but does not now have the information as to the specific date thereof.

(a) In answer to interrogatory 2(a), libelant says that whatever bill of sale it had in its possession, custody or control, the same was destroyed at Texas City, Texas, on April 16, 1947, by an explosion which demolished the building in which respondent maintained its office.

(b) See answer to interrogatory 2(a).

3. In answer to interrogatory 3, libelant is without knowledge or information to answer the same.

(a) In answer to interrogatory 3(a), libelant is without knowledge or information to answer the same.

[fol. 47] (b) In answer to interrogatory 3(b), libelant does not have a copy, blueprint or photostat of the original papers of the barge.

4(a) In answer to interrogatory 4 (a), libelant says a general cargo barge.

(b) In answer to interrogatory 4 (b), libelant says a barge for the carriage of molasses in bulk.

(c) In answer to interrogatory 4(c), libelant says, Lt. Col. Joseph C. Tourne, 126 South Olympia Street, New Orleans, La.; and Arthur A. Grant, Canal Building, New Orleans, La.

(d) In answer to interrogatory 4 (d), libelant is advised that rough sketches were made for the contractor's guidance.

(e) See answer to interrogatory 4 (d).

(f) In answer to interrogatory 4 (f), libelant says he understands such were not retained, as there was no reason to do so.

(g) In answer to interrogatory 4(g), libelant is advised that the said Lt. Col. Joseph Tourne made rough sketches for the conversion of the barge. And further answering said interrogatory, libelant says that he understands said rough sketches were not preserved, as there was no reason to preserve same.

(h) In answer to interrogatory 4(h), libelant says he does not have possession of blueprints or photostats of the rough sketches. (See answers to interrogatories 4(f) and 4(g).

[fol. 48] (i) In answer to interrogatory 4(i), libelant says, Froelich Iron Works, New Orleans, La., under the supervision of Arthur A. Grant.

(j) In answer to interrogatory 4(j), libelant believes that all recom- (sic) were carried out.

5(a) In answer to interrogatory 5(a), libelant answers in the negative, since libelant had no such use for the barge.

(c) In answer to interrogatory 5(c), libelant is informed that such an application was made by Arthur A. Grant under date of February 9, 1943.

(d) In answer to interrogatory 5(d), libelant says that the Coast Guard should be in possession thereof. In further answer to said interrogatory, libelant says that it has not in its possession or under its control, and has no knowledge of, a reply of the Coast Guard to such application.

6(a) In answer to interrogatory 6(a), libelant says that it is not in possession of records for reason given in answer 2(b), to specifically answer the interrogatory.

(b) Same as answer to interrogatory 6(b).

(c) See answer to interrogatory 2 (b).

7. In answer to interrogatory 7, libelant says that approximately 50% of the International Transportation Corporation was owned by shareholders of the Southwestern Sugar & Molasses Company.

8(a) In answer to interrogatory 8(a), libelant says that as all records were destroyed, libelant cannot definitely answer the question, but it believes it did so acquire the barge.

[fol. 49] (b) See answer to interrogatory 2(a).

(c) See answer to interrogatory 7.

(d) In answer to interrogatory 7(d), libelant says that without the records (see answer to interrogatory 2(a)) it is unable to answer the interrogatory.

(e) See answer to interrogatory 2(a).

9. In answer to interrogatory 9, libelant does not now recall whether there was a written charter party or whether the barge was chartered by letters, or whether it was verbal, and, as libelant's records have been destroyed, it is unable to definitely answer said interrogatory.

10. In answer to interrogatory 10, libelant says it has no such plan in its possession, custody or control, and knows of no one who has.

11. In answer to interrogatory 11, libelant says it has no independent recollection and, since all records were destroyed, it cannot answer said interrogatory.

12. Same as answer to interrogatory 11.

13. Same as answer to interrogatory 11.

14(a) In answer to interrogatory 14(a), libelant says, Captain A. A. Colbury, Houston, Texas; R. L. Wynne, Houston, Texas; H. B. Lambdin, Houston, Texas; and libelant is informed, James Gleave, Galveston, Texas, and Arthur A. Grant.

(b) In answer to interrogatory 14(b), libelant says that Captain A. A. Colbury acted for International Transportation Corp.; R. L. Wynne acted for Cargo Underwriters; H. B. Lambdin acted for Southwestern Sugar & Molasses Co; and libelant was advised by letter of October 9, 1944 [fol. 50] of respondent that James Gleave would represent respondent at the survey to be held the following day; and libelant is informed Arthur A. Grant acted on behalf of respondent.

(c) In answer to interrogatory 14(c), libelant says, John D., M. A. & Edwin H. Grace, proctors for libelant, have possession, custody and control of the survey reports made by the surveyors above set forth, with the exception of James Gleave and Arthur A. Grant. Libelant excepts to said interrogatory in requesting copies of said reports, in possession of proctors for libelant, to be attached for the reason that such cannot be required to be attached to answer to interrogatories, and, upon further ground, that good cause is not shown for the production thereof, and such documents are privileged.

15. In answer to interrogatory 15, libelant says that its proctors herein had correspondence with the surveyors representing the Cargo Underwriters and libelant.

(b) Such correspondence was in the course of developing libelant's case and is privileged, and, for that reason, libelant excepts to said interrogatory.

16. In answer to interrogatory 16, libelant says that, because all records have been destroyed, it cannot definitely answer said interrogatory, but it believes that no such correspondence was had by libelant, its officers, agents, or employees. In further answer to said interrogatory, libelant says that its proctors had correspondence with Hull Underwriters & Cargo Underwriters and their representatives dealing with the cause and/or extent of the damage to the barge PETER B. and/or its cargo.

[fol. 51] (a) John D., M. A. & Edwin H. Grace, proctors for libelant. Libelant except to said interrogatory in requesting copies of said correspondence to be attached for the reason that such cannot be required to be attached to answer to interrogatories, and, upon further ground, that good cause is not shown for the production thereof, and the same is privileged.

17. In answer to interrogatory 17, libelant says that respondent has not taken its testimony, and, until it does so and closes its case, libelant will be unable to advise what witnesses, if any, whose testimony has not already been taken by deposition in this case, will be taken in support of libelant's case in rebuttal, if such be necessary. Libelant further objects to said interrogatory for the reason that no cause is shown why such should be furnished.

Southwestern Sugar & Molasses Company, By: S/ A. I. Kaplan, President.

s/ John D., M. A. & Edwin H. Grace, Proctors for Libelant.

Duly sworn to by A. I. Kaplan, jurat omitted in printing.

[fol. 52]

IN UNITED STATES DISTRICT COURT

REQUEST FOR ADMISSIONS—Filed January 5, 1951

Messrs. John D., M. A. and Edwin H. Grace, Esqs., Proctors for libellant, Southwestern Sugar & Molasses Company, Baronne Building, New Orleans, Louisiana.

Please take notice that respondent, River Terminals Corporation, hereby requests libellant, Southwestern Sugar & Molasses Company, pursuant to Rule 32B of the Admiralty Rules promulgated by the Supreme Court of the United States, to admit within ten (10) days after service of this request, the truth of the matters of fact hereinafter set forth and the genuineness of the documents hereinafter described and copies of which are delivered with this request:

1. That Barge PETER B (ex ABL-109) was built of steel in 1926 at Pittsburgh, Pennsylvania, by Jones & Laughlin Steel Company of Pittsburgh, Pennsylvania, for American Barge Line Company and on completion was delivered to that Company.

2. That the two attached photostats marked Exhibits RTC 1-A, and RTC 1-B are photostats of the construction [fol. 53] plans of the barge.

3. That the photostat hereto attached and marked Exhibit RTC 2 is a photostat of the bill of sale from Petroleum Carrier Corporation to Southwestern Sugar & Molasses Company.

4. That the photostat hereto attached and marked Exhibit RTC 3 is a photostat of the bill of sale from Southwestern Sugar & Molasses Company to International Transportation Company.

5. That the photostat hereto attached and marked exhibit RTC 4 is a photostat of the bill of sale from International Transportation Company to Southwestern Sugar & Molasses Company.

6. That the photographs marked Exhibits RTC 5, 6 and 7 are true photographs of the deck of the barge taken by Litterst Commercial Photo Company on the 12th day of October, 1944.

7. That the photographs marked Exhibits RTC 8, 9 and 10 are true photographs of the side of the barge taken by Litterst Commercial Photo Company on the 12th day of October, 1944.

8. That the photostat marked Exhibit 11 is a copy of a letter written by L. H. Frieler to Mr. A. I. Kaplan and delivered by Mr. Frieler to a representative of the Marine Office of America, Southern Department, in connection with the settlement of the loss with Southwestern Sugar & Molasses Company was then adjusting with the Marine Office of America and/or an insurance company or underwriter represented by the Marine Office of America, Southern Department.

[fol. 54] 9. That at the time of the transportation of the barge PETER B from Reserve, Louisiana, to Texas City, Texas, immediately preceding its sinking on the 24th day of September, 1944, River Terminals Corporation was an interstate common carrier for hire by water, so certified by the Interstate Commerce Commission, and that as such interstate commerce carrier for hire by water it had filed with and there had been published by the Interstate Commerce Commission the River Terminals Corporation's tariffs, among which are tariffs providing the River Terminals Corporations rates, rules, regulations, obligations and liabilities for the carriage of commodities, including the transportation of molasses in bulk from Reserve, Louisiana, a port on the Mississippi River, to Texas City, Texas, located on the Intercoastal Waterway system in barges, not the property of or furnished by the carrier; that the tariff in effect covering such transportation movement was River Terminals Corporation Tariff I.C.C. No. A-9, as supplemented and amended which contained the following provisions, among others:

Item No. 180

"Handling of Empty Barges Furnished by Parties Other Than Carriers Parties to This Tariff

"Except as otherwise provided in Tariff, rates named herein will include the movement of empty barges furnished by parties other than Carriers parties to this Tariff from point of discharge to point of interchange or from point of interchange to point of loading."

[fol. 55] Item No. 580

"Carriers' Non-Liability

. . . . . .

"When shipments are transported in barges furnished by owners, shippers, consignees or parties other than the Carriers parties to this Tariff, such barges and (or) cargoes will be handled at Owner's risk only, whether loss or damage is caused by negligence or otherwise."

. . . . . .

Item No. 640

"Furnishing of and Handling Barges

"The carriers parties to this Tariff will furnish open or closed type dry cargo barges, depending on character of material to be transported. TANK BARGES WILL NOT BE FURNISHED.

. . . . . .

Presentation of a shipment in barge furnished by shipper, consignee or owner for movement on rates named herein shall constitute a guarantee to the Carriers parties to this Tariff that such barge is seaworthy and barge and cargo are in suitable condition for voyage in prospect. However, the Carriers parties to this Tariff, despite such implied guarantee, shall be privileged to refuse acceptance if the barge is in apparent bad order. If unfitness of barge or cargo is discovered after voyage has begun, then the

Carriers parties to this Tariff shall be privileged to deliver such barge at nearest landing for holding at expense of shipper, consignee or owner, in which event freight charges shall be adjusted in conformity with rates provided in this Tariff for distance barge was actually moved by the Carriers parties to this Tariff. If deficiencies are remedied by shipper in the judgment of the Carriers parties to this Tariff, shipper may reforward the barge to ultimate destination at through rate applicable without additional charge for the stop over for repairs.

* * * * * * *

Item No. 896 (g)

"Actual Placement—Actual placement of barge or barges is delivery of the barge or barges by the carrier [fol. 56] to the point of loading or unloading designated by Shipper, consignee or their agents."

10. Barge PETER B (ex ABL-109) was furnished by libellant for the transportation of a cargo of molasses from Reserve, Louisiana to Texas City, Texas, and was delivered to River Terminals Corporation empty and was by River Terminals Corporation transported empty to Reserve, Louisiana; that the tug did not stand by the barge while the loading was being effected; that the barge was loaded with molasses by a party other than the River Terminals Corporation and by a party for whose conduct the River Terminals Corporation was not and is not responsible; that the loaded barge was redelivered to River Terminals Corporation at Reserve, Louisiana for transportation to Texas City, Texas; that the transportation was performed pursuant to the provisions of the Tariff I.C.C. A-9 as supplemented and amended.

s/ Selim B. Lemle, s/ Pat F. Bass, 1836 National Bank of Commerce Building, New Orleans, Louisiana, Proctors for River Terminals Corporation.

Service Accepted
All right reserved 1/5/51.

s/ John D., M. A. and Edwin H. Grace, Proctors for Southwestern Sugar & Molasses Company.

In United States District Court.

Supplemental and Amended Answers to Interrogatories —Filed January 5, 1951

Now comes Southwestern Sugar & Molasses Company, and in compliance with the order of court requiring fur-
[fol. 57] ther answer to interrogatories of respondent, Nos. 2, 4(d), 4 (e), 4(f), 6(q), (sic) 6(b), 7, 8(c) and 9, and in overruling exceptions of libelant to interrogatories 15(b), says:

1. In answer to interrogatory 2, libelant avers that its president has made every effort to locate the original bill of sale, or copy thereof, or other data by which it acquired the barge PETER B from the Petroleum Carrier Corporation, but has been unable to do so, but to the best of its knowledge, informatioin (sic) and belief, it did so acquire the said barge on or about September 1, 1942.

2. In answer to interrogatory 4(d), libelant files herewith the original letter of Joseph C. Tourne, Marine Surveyor, under date of November 30, 1950, and which is self-explanatory, and also the survey report of Arthur A. Grant, Marine Surveyor, dated February 25, 1943.

3. Libelant answers 4(e) the same as 4(d).

4. In answer to interrogatories 6(a) and (b), libelant says the barge was sold to the International Transportation Corporation, but libelant is unable to now give the price and date of sale, the reason being that all records of libelant company were destroyed in the Texas City catastrophe on April 16, 1947; that libelant's president and president of the International Transportation Corporation kept the files of the transactions of both companies in the same building at Texas City, and which were destroyed, and libelant's president has made diligent efforts to ascertain the date and price but has been unable to do so, but libelant's president knows the date to be long prior to September 1944, but for the purpose of this proceeding, [fol. 58] libelant will admit the date of sale as of, on, or about March 29, 1944.

5. In answer to interrogatory 7, libelant says that the names of the shareholders and amount of stock of the International Transportation Corporation, as of March 29, 1944 and September 24, 1944, were as follows:

National Molasses Co.	240 shares
A. I. Kaplan	216 "
Samuel Berger	72 "
Peter G. Berdeshevsky	72 "

A. I. Kaplan was president, and he, Samuel Berger, Peter G. Berdeshevsky, Morris Roseman and Samuel Fisher were the directors, as of the same dates.

The names of the shareholders and the amount of stock of the Southwestern Sugar & Molasses Company, as of March 29, 1944 and September 24, 1944, were as follows:

A. I. Kaplan	60%
Samuel Berger	20%
Peter G. Berdeshevsky	20%

A. I. Kaplan was president, and he, Samuel Berger, Peter G. Berdeshevsky, and Lutus H. Frieler were directors, as of the same dates.

6. In answer to interrogatory 8(c), libelant says they were the same as of March 29, 1944 and September 24, 1944.

7. In answer to interrogatory 9, libelant avers that its president has made diligent search for a written charter party, letters with respect to a charter of the barge, and attempted to ascertain from parties who may have some recollection thereof, and libelant is unable to say whether the charter of the barge was by written charter party, [fol. 59] letters, verbal, and libelant's president cannot at this late date recall, but he does know that the barge was under charter to libelant from the International Transportation Corporation during the month of September 1944, and long prior thereto, as alleged in the libel and to which he affirmed under oath in September 1945. In further answer to said interrogatory, libelant reiterates, as set forth in the original answer to this interrogatory, that all

the records of the Southwestern Sugar & Molasses Company were kept in a building at Texas City, Texas, and were destroyed in the Texas City catastrophe on April 16, 1947; that libelant's president, who was also president of the International Transportation Corporation, kept all the files of transactions of both companies in the same building, and libelant says that, if any charter party in writing existed, or letters pertaining thereto kept by either company, such would have been destroyed in the Texas City catastrophe.

Libelant amends and supplements its answer to interrogatories 5(a), (b), (c) and (d) as follows:

8. Application was made by Arthur A. Grant, Marine Surveyor, to the United States Coast Guard, requesting certificate to permit barge to carry fuel oil of grades "C" and lower, in inland waters only, as shown by a signed copy of his letter under date of February 9, 1943, with copy of plan and description of barge enclosed with the letter addressed to Captain Samuel Lorche, United States Coast Guard, attached hereto.

(b) Libelant is advised the application was denied by [fol. 60] the Coast Guard.

(c) Yes, see answer to (a).

(d) Copy of application is attached, but libelant does not have the answer of the Coast Guard thereto.

In compliance with the order of the court requiring production of all correspondence between the parties therein described in 15(a) and (b), copies thereof are hereto attached.

Southwestern Sugar and Molasses Co., By: (sgd) A. I. Kaplan, President.

(sgd) John D., M. A. & Edwin H. Grace, Proctors for Libelant.

Duly sworn to by A. I. Kaplan, jurat omitted in printing.

[fol. 61]

IN UNITED STATES DISTRICT COURT

THE FOLLOWING LETTERS ARE ANNEXED TO FOREGOING SUPPLEMENTAL AND AMENDED ANSWERS OF LIBELANT TO INTERROGATORIES BY RESPONDENT

THE BOARD OF UNDERWRITERS OF NEW YORK
Cotton Exchange Building
Houston, Texas

March 12, 1948

Messrs. John D., M. A. & Edwin H. Grace
Baronne Building
New Orleans 12, La.

Attention: Mr. M. A. Grace

Dear Sir:

Please refer to your letter of March 10th with respect to the sinking of the barge PETER B. 9/24/44, your file No. 20,537. I attach copy of our letter to you dated January 6th, in which I answered these inquiries. Evidently, the letter must have been miscarried in the mails or has been misplaced.

I trust that this will fill your needs; and if there is anything further in which I can assist in, please advise.

Very truly yours,

(sgd) R. L. WYNNE
R. L. WYNNE, Chief Surveyor
Houston District

RLW:hs
Encl.

[fol. 62] March 10, 1948

Captain R. L. Wynne
Cotton Exchange Bldg.,
Houston, Texas

Re: Sinking of Barge "Peter B"
9/24/44—File No. 20,537

Dear Captain:

Under date of December 30, 1947, we wrote you as follows:

"We have for acknowledgment your letter of December 26th in reply to our letter of December 12th, and thank you for the information therein contained.

"There are two matters we would thank you to clarify for us, and they are as follows:

"The officers and crew of the tug that delivered the barge "Peter B" to Texas City prior to her sinking on the occasion in question have made the statement that they opened the hatches on the rake space and found no water contained therein. From your observation of the corroded condition of the lugs and their position, would it, in your opinion, have been possible for the crew of the tug to have opened the manhole as they have stated they did on the occasion in question?

"The second question is as follows:

"It has been reported that the deck of the forward rake in the way of the port bit was open sufficiently to allow the ingress of water into the rake after the bow of the barge was submerged. We understand that there were considerable other parts of the deck of the barge "Peter B" that were cracked and that these cracked conditions were attributed to the sinking and the raising of this barge. From your inspection; can you let us have an expression of opinion on this question?"

Not having heard from you, we presume that this letter miscarried.

It certainly would be appreciated if you would advise us in the premises at your earliest convenience.

Yours very truly,

JOHN D., M. A. & EDWIN H. GRACE

BY

DHG/ss

[fol. 63] January 6, 1948

Messrs. John D., M. A. & Edwin H. Grace
Baronne Building
New Orleans 12, La.

Attn: Mr. M. A. Grace

Dear Sir:

In reply to your letter of December 30th, please be advised as follows:

I am of the opinion that it would have been possibly for the crew of the tug to have opened these manholes, as the lugs were not tightened down; it would have been impossible for them having done so, due to their corroded condition. All they had to do was to kick the lug over and open the plate.

The deck of the barge "Peter B" had numerous cracks all over. I am of the opinion that these cracks opened as a result of the sinking and raising of this barge; but I am further of the opinion that had the deck been in a strong condition instead of a badly deteriorated and rusted out condition, that cracks would not have occurred due to the sinking and raising of the barge.

I trust that this will serve to answer your inquiries. If there is anything further I can assist in, please advise.

Very truly yours,

R. L. Wynne, Chief Surveyor
Houston District

RLW:hs

[fol. 64]

December 30, 1947

Captain R. L. Wynne
Cotton Exchange Bldg.
Houston, Texas

Re: Sinking of Barge PETER B.
9/24/44

Dear Captain:

We have for acknowledgment your letter of December 26th in reply to our letter of December 12th, and thank you for the information therein contained.

There are two matters we would thank you to clarify for us, and they are as follows:

The officers and crew of the tug that delivered the barge PETER B. to Texas City prior to her sinking on the occasion in question have made the statement that they opened the hatches on the rake space and found no water contained therein. From your observation of the corroded condition of the lugs and their position, would it, in your opinion, have been possible for the crew of the tug to have opened the manhole as they have stated they did on the occasion in question?

The second question is as follows:

It has been reported that the deck of the forward rake in the way of the port bit was open sufficiently to allow the ingress of water into the rake after the bow of the barge was submerged. We understand that there were considerable other parts of the deck of the Barge PETER B. that were cracked and that these cracked conditions were attributed to the sinking and the raising of this barge. From your inspection, can you let us have an expression of opinion on this question?

Yours very truly,

JOHN D., M. A. & EDWIN H. GRACE

By

MAG/ss

[fol. 65]

THE BOARD OF UNDERWRITERS OF NEW YORK
Cotton Exchange Building
Houston, Texas

December 26, 1947

Messrs. John D., M. A. & Edwin H. Grace
Baronne Building
New Orleas 12, La.

Gentlemen:

In reply to your letter of December 12, please be advised that the manhole covers of the Forward dry rake were in such condition, due to the holding down lugs being corroded, that it would have been impossible to have made any of these compartments water-tight.

This condition could not have occurred in six days time.

I am of the opinion that the barge PETER B would not have sunk to a point where her deck forward would be level with the water without there having been additional weight in the form of liquid or other weight in the dry rake place.

I did not note any molasses in the Forward rake space.

At the time of my inspection, the manholes were found in this corroded condition, in the dry cargo space as well the rake space.

I trust that the above will serve to answer your inquiries. If there is anything further I can assist in, please advise.

Very truly yours,

(sgd) R. L. Wynne
R. L. Wynne, Chief Surveyor
Houston District

RLW/ns

[fol. 66] December 23, 1947

Captain R. L. Wynne
Houston, Texas

Re: Sinking of Barge "Peter B"
9/24/44

Dear Captain:

Under date of December 12th, we wrote you concerning the above matter in which we requested certain information. Not receiving a reply from you, the thought occurs to us that probably our letter to you did not reach you, and we are therefore writing to inquire if you received the same, and as to when you will be in a position to furnish us with the information requested.

Wishing you the compliments of the season, we remain

Yours very truly,

JOHN D., M. A. & EDWIN H. GRACE

By

MAG/ss

[fol. 67] December 12, 1947

Captain R. L. Wynne
Houston, Texas

Dear Sir:

We represent the Southwestern Sugar & Molasses Company and the owners of her cargo of molasses with respect to the loss sustained as a result of the sinking of the barge PETER B. at Texas City on September 24, 1944. We understand that your principals, Appleton & Cox, Inc., have written you requesting that you give us whatever information you can concerning the condition of this barge, and to cooperate with us. We are writing you at this time to ascertain what information you can afford us with respect to the following question:

We note from your survey report, copy of which is in our files, that you in part say:

"* * * found that the holding down lugs on the manhole on the forward dry rake were corroded so badly that it would have been impossible to have made this manhole watertight as the nuts could not be worked on the bolts and the cover screwed down tight."

With respect to this finding we would thank you to inform us if you could testify that it was evident from the manner in which the holding down lugs were corroded that these manhole covers on the forward dry rake space had not been opened for a long period of time prior to the sinking of the barge at the time in question. We desire to ascertain this fact because the crew of the tug that towed the barge to Texas City stated that before leaving the barge they had opened these manholes, looked in to and found the rake space dry. We do not believe this testimony to be correct.

(2) Could the short time, 6 days, that the barge's deck was under water, account for the corroded condition of the holding down lugs as found by you?

(3) We would thank you to let us have an expression of opinion as to whether or not the barge PETER B. would have sunk to a point where her deck forward would be level with the water without there having been water or other liquid substance in the dry rake space if you say that this could happen without water or other liquid getting in the rake space, we would thank you to explain this fully for us.

Was there any molasses found in the forward rake space while the barge was being raised? If so, how in your opinion did it get there?

[fol. 68] At the time you inspected the manholes and found this corroded condition, we understand from your report that the manhole on the dry cargo space was not and could not have been made water tight. Please inform us if we are correct as to this.

Very truly yours,

JOHN D., M. A. & EDWIN H. GRACE

By

MAG/ss

[fol. 69]

BENCAL & LAMBDIN
Cotton Exchange Building
Houston, Texas

November 28, 1947

John D., M. A. & Edwin H. Grace
Baronne Building
New Orleans 12, La.

Attn: Mr. M. A. Grace

Gentlemen:

In reply to yours of November 24, relative to taking my testimony on behalf of the Southwestern Sugar & Molasses Company in the sinking of their barge "Peter B" at Texas City, September 24, 1944, wish to advise that the corroding of the holding down lugs and nuts on the manhole of the forward rake would not necessarily render this manhole nonwatertight because had the manhole been properly secured and left remaining so for any period of time the lugs and nuts would naturally become corroded. Further, the forward end of this barge was submerged in salt water at Texas City, Texas for a period of six days. This would in itself cause corrosion. Assuming that the manhole was watertight, the deck of the forward rake in way of the port bitt was open sufficient to allow the ingress of water into the rake after the bow of the barge was submerged.

It is noted in your letter that you have a copy of my survey report. I wish to advise at this time that I have discussed the contents of this survey report with Mr. Selim B. Lemle during the fall of 1946 on behalf of the River Terminals Corporation and advised that gentleman that I would testify if requested relative to the contents of the survey report.

Very truly yours,

BENCAL & LAMBDIN
(sgd.) H. B. Lambdin

HBL:G

[fol. 70]

JOHN D., M. A. & EDWIN H. GRACE
LAWYERS

Baronne Building,
New Orleans 12, La.

November 24, 1947

Messrs. Bencal & Lambdin
Cotton Exchange Building
Houston, Texas.

Attn: Mr. H. B. Lambdin

Dear Sirs:

We are attorneys for the Southwestern Sugar & Molasses Company in litigation pending here in the United States District Court growing out of the sinking of their barge PETER B. at Texas City.

At that survey you acted, as you will no doubt recall, as surveyor for Southwestern Sugar & Molasses Company, owner of said barge and cargo. We have a copy of your survey report.

It may be that in the near future, at a time convenient to you, we will want to take your testimony herein. However, the purpose of this letter is to ascertain if from your examination of the condition of the manhole in the rake space you could testify that the holding down lugs on the manhole on the forward rake were corroded so badly that it would have been impossible to have made this manhole water-tight, as the nuts could not be worked on the bolts and the cover screwed down tight. That this condition would be plainly visible and gave positive evidence that the said manhole had not been opened for a long period of time days before the sinking of the barge.

Your very truly,

JOHN D., M. A. & EDWIN H. GRACE

BY

MAG/ss

[fol. 71]

SOUTHWESTERN SUGAR & MOLASSES CO.
Box 171
Texas City, Texas

Report No. 34 October 3, 1944

Captain R. L. Wynne
Board of Underwriters of New York
617 Caroline Street
Houston, Texas

Dear Capt. Wynne:

We refer to gauge which you and Joe Garcia took before starting pumping molasses out of the sunken barge. Later on, another gauge was taken in order to determine how much molasses was pumped into the shore tank.

Gauges were taken in a hurry due to circumstances, and no foam bucket was used. The gauge without foam bucket showed 9,919 gallons received. There is at least one inch of foam on the surface of the molasses. The calibration for one inch in this tank shows to be 4,6,23 gallons.

On September 30th, I checked the inventory and discovered that it was impossible that 9,919 gallons were pumped out of the sunken barge into Tank No. 1. On September 1st, our fiscal Book Inventory showed:

Molasses on hand	1,755.20	Tons
We bought during month of Sept.	946.19	"
Total	2,701.39	"
We shipped during Sept.	1,410.20	"
	1,291.19	"
Plus 4% on sales gained by overrun on 1,410.20 tons	56.40	"
We should have on hand	1,347.59	"
Fiscal Inventory shows we had on hand	1,374.23	"
Or 26.64 tons were pumped into Tank 1 out of barge	26.64	"

These 26.64 tons in excess of our inventory were pumped out of the barge into Tank No. 1.

26.64 tons @ 171 gals. to a ton is 4,555 gals.

[fol. 72] The received quantity of 4,555 gallons can be checked in the following manner:

Our previous cargo consisted of 133,942 gallons. This cargo was unloaded in 20 hours and this means that we discharged 6,697 gallons per hour. In Salvaging the sunken cargo, we pumped for about half an hour straight time, which would be about 3,348 gallons.

All the figures which I am giving you can be checked back in our office.

Yours very truly,

SOUTHWESTERN SUGAR & MOLASSES COMPANY

By (sgd) L. F. Frieler

LHF:OG

[fol. 73]

SOUTHWESTERN SUGAR & MOLASSES COMPANY
Box 171
Texas City, Texas

October 2, 1944

Capt. R. L. Wynne
Board of Underwriters of New York
617 Caroline Street
Houston, Texas

Dear Sir:

Please be advised that Barge PETER B. is afloat at Dock "O" at Texas City.

In checking inventories as per September 30, we notice that we are short about 14 tons. When the gauges were made by you and Joe Garcia, the foam on top of the molasses must not be taken in consideration.

At the time you are making your next survey, I would like to discuss this difference in inventory with you.

Yours very truly,

SOUTHWESTERN SUGAR & MOLASSES CO.

By: L. H. FRIELER

LHG:OG

[fol. 74]

SOUTHWESTERN SUGAR & MOLASSES COMPANY
Box 171
Texas City, Texas

September 28, 1944

Capt. R. L. Wynne
The Board of Underwriters of New York
617 Caroline Street
Houston, Texas

Dear Capt. Wynne:

Refer to your letter of September 26, 1944.

Please be advised that on a previous cargo several years ago, the captain of the vessel used seawater as thinner in order to pump the cargo out. At that time we had the experience that seawater mixed with molasses will make the molasses foamy and bubbling which can hardly be stopped. The small percentage of molasses which we have put into the tank up to date might not have any effect on the molasses in the shore tanks, but should additional molasses be put into the tank, a bubbling and foamy condition might come about.

I want to help you in salvaging as much as possible of the cargo, but at the same time, I do not want to ruin the molasses which is in the tank.

I am familiar with the Beaume test and know at what density the molasses will sour applying fresh water, but with sea water it is an entirely different matter.

I am not a chemist, therefore I would suggest that you or a chemist pass on future molasses which might be salvageable.

The molasses approximately 9,000 gallons which was pumped into our tank was 40 to 41 Beaume. Please understand that molasses under 39 will sour. The cargo when tested in New Orleans was over 43 Beaume.

Yours very truly,

SOUTHWESTERN SUGAR & MOLASSES CO.

By: L. H. FRIELER

LHF:OG

[fol. 75]

THE BOARD OF UNDERWRITERS OF NEW YORK
617 Caroline Street
Houston, Texas

September 28, 1944

Southwestern Sugar & Molasses Co.
Texas City, Texas

Attn: Mr. H. L. Frieler Re: Submerged cargo of Barge PETER B

Gentlemen:

This will acknowledge receipt of your letter of September 25th. With reference to the third paragraph of your letter: "AS per your instructions, all molasses less than 41 Beaume will be pumped into the Bay", please be advised that this is in error; my recommendations were to the effect that all molasses which were mixed with water to such an estent as to be unfit for use would necessarily have to be pumped overboard until the barge could be floated.

Very truly yours,

(sgd) R. L. WYNNE
R. L. WYNNE

RLW: jg

[fol. 76]

SOUTHWESTERN SUGAR & MOLASSES COMPANY
Box 171
Texas City, Texas

September 25, 1944

Mr. R. L. Wynne
The Board of Underwriters of New York
617 Caroline Street
Houston, Texas

Dear Mr. Wynne:

Refer to submerged cargo of Barge PETER B.

We are willing to take any molasses which is over 41 beaume out of the submerged cargo. If we would take molasses lower than 41 beaume, I am afraid that same might spoil all the molasses in the shore tanks.

As per your instructions, all molasses less than 41 beaume will be pumped into the bay.

Yours very truly,

Southwestern Sugar & Molasses Co.

By: L. H. Frieler

LHF:OG

[fol. 77]

THE BOARD OF UNDERWRITERS OF NEW YORK
617 Caroline Street
Houston, Texas

September 21, 1944

Southwestern Sugar & Molasses Co.
Texas City, Texas

Attn: Mr. Frieler

Gentlemen:

Confirming our telephone conversation of yesterday, please be advised that I wish to attend on board the barge PETER B. prior to that barge being discharged at Texas City. Please give me as much advance notice as possible

in order that I may attend without causing you any inconvenience.

Very truly yours,

(sgd) R. L. WYNNE
R. L. Wynne

RLW: jg

[fol. 78]

IN UNITED STATES DISTRICT COURT

REPLY OF LIBELLANT TO REQUEST FOR ADMISSIONS—
Filed January 30, 1951

Libelant, Southwestern Sugar & Molasses Company, in reply to the request of respondent, River Terminals Corporation, for admissions, says:

1. It admits request number 1.

2. It is without sufficient information to admit, or deny, request number 2.

3. It admits request number 3.

4. It admits request number 4.

5. It admits request number 5.

6. It is without sufficient information to admit, or deny, request number 6.

7. It is without sufficient information to admit, or deny, request number 7.

8. It admits request number 8.

9. In reply to request number 9, it admits the same with the exception that it says that the tariffs therein cited did not provide the obligations of River Terminals Corporation for the carriage of the molasses loaded on the barge PETER B. to be delivered to libelant at Texas City, Texas, the obligation therefor being exclusively controlled by the bill of lading issued by respondent therefor, referred to and made part of libelant's amended libel, and which said items of tariffs are not included therein or made part thereof. And libelant further says that such provi-

sions of tariff providing an exemption of liability on behalf of the carrier for damage caused by its negligence are [fol. 79] invalid and of no force and effect herein, if such formed part of the contract of carriage.

10. In reply to request number 10, it admits the same, except it denies that the transportation was performed pursuant to the provisions of the Tariff I. C. C. A-9 as supplemented and amended, and, on the contrary, says that the said transportation was performed exclusively under the terms of said bill of lading above referred to, and which does not include therein, or make part thereof, the provisions of the Tariff I.C.C. A-9. And libelant further says that such provisions of tariff providing an exemption (sic) of liability on behalf of the carrier for damage caused by its negligence, are invalid and of no force and effect herein, if such formed part of the contract of carriage.

(sgd) John D., M. A. & Edwin H. Grace, Proctors for Southwestern Sugar & Molasses Company.

Duly sworn to by Edwin H. Grace, jurat omitted in printing.

[fol. 80]

IN UNITED STATES DISTRICT COURT

AMENDED REPLY TO REQUEST FOR ADMISSIONS—
Filed February 19, 1951

Libelant, Southwestern Sugar & Molasses Company, from information received subsequent to filing its reply herein, amends said reply by admitting requests numbers 6 and 7.

(sgd) John D. M. A. & Edwin H. Grace, Proctors for Southwestern Sugar & Molasses Company.

State of Louisiana:
Parish of Orleans:

Before me, the undersigned authority, personally came and appeared Edwin H. Grace, who being by me first duly sworn, did depose and say:

[fol. 81] That he is proctor for libelant, Southwestern Sugar & Molasses Company; that he has read the foregoing amended reply to the request of respondent, River Terminals Corporation, for admissions and knows the contents thereof, and the same is true to the best of his knowledge, information and belief; that his information is based upon information received from H. B. Lambdin, marine surveyor.

Affiant further states that the reason this affidavit is made by proctor instead of libelant, Southwestern Sugar & Molasses Company, is because libelant is a foreign corporation, without an office in this State, and no officer thereof within the jurisdiction of this Court.

(sgd) Edwin H. Grace

February 10, 1951

Service Accepted; All rights Reserved.

Lemle & Kelleher, by (sgd) Pat F. Bass, Proctors for River Terminals Corp.

Sworn to and subscribed before me 8th day of February, 1951 (sgd) Robert L. A. Indcat, Notary Public.

In United States District Court

Transcript of Testimony

May 15th, 1956

Christenberry, J.:

Case Called, Hearing & Submission.

This cause came on this day for trial.

Appearances

Present: P. M. Flanagan, Esq., Amos L. Ponder, Jr., Esq., George Varian, Esq., Proctors for Libellant.

[fol. 82] Selim B. Lemle, Proctor for Respondent.

On motion of Amos L. Ponder, Jr., Mr. George Varian of the New York Bar was allowed to participate in the trial of said cause.

On motion of Libellant, witnesses called, sworn, instructed, and segregated.

Witnesses for Libellant:

L. H. Frielier—previously sworn
Warda White— do

By consent Respondent's witness taken out of turn.

A. A. Grant—sworn by Clerk

Witnesses for Libellant:

Deposition of Joe E. Garcia
Deposition of Leroy C. Postas

Counsel for Libellant announced that he would rest.

Witnesses for Respondent:

Deposition of R. L. Wynne
" H. B. Lambden
" J. M. Stovall
" Alphonse Allemond
" John S. Hinkle

Counsel for Respondent announced that he would rest.
Counsel for Libellant announced that he would rest.

Counsel for Libellant to have 2 weeks to file briefs; Counsel for Respondent to have 2 weeks to reply; 10 days thereafter to Libellant to reply.

[fol. 83] Trial Proceedings in the above numbered and entitled case, heard in the United States District Court, Eastern District of Louisiana, New Orleans, Louisiana, on May 15, 1956; the Honorable Herbert W. Christenberry, United States District Judge, presiding.

The court opened at 10:00 A. M. May 15, 1956.

The Court: Be seated.
Are you ready, gentlemen?

Mr. Ponder: May it please the court, at this time I would like to introduce to the court Mr. George Varian of the New York bar who is admitted there and who is admitted

to the Federal Courts there and ask permission that he be allowed to participate in the case.

The Court: Very well.

Mr. Varian: Thank you, sir.

The Court: Proceed.

Mr. Varian: May I proceed?

The Court: Yes.

Mr. Varian: I may be a little unfamiliar with the practice in this District, sir. First I would like to ask Your Honor [fol. 84] whether you would like an opening——

The Court: I don't think it is necessary. I have read the record but if you think it might be helpful, I'll be glad to listen.

Mr. Varian: Well Mr. Ponder indicated to me last night that Your Honor probably would read the record and I assumed that if you had, you would probably dispense with opening.

The Court: Very well.

Mr. Varian: All right; then I will call my first witness.

Mr. Ponder: May it please the court, we have two witnesses; Mr. Frielier and Mrs. White if we could have them sworn at this time—I don't know if you want them separated?

Mr. Lemle: I'd like a separation.

The Court: Are there any other witnesses outside or are these the only ones called?

Mr. Lemle: I have a surveyor who will be sometime during the day.

The Court: All right.

Let these witnesses be sworn.

(The witnesses were duly sworn.)

[fol. 85] The Court: Now do not discuss the case with anyone except the attorneys in the case.

Which one do you want to call first?

Mr. Varian: Call Mr. Frielier.

The Court: Let the lady wait outside.

L. H. FRIELIER: a witness called by and on behalf of the Libellant, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Varian:

Q. Mr. Frielier, by whom are you employed?
A. Southwestern Sugar and Molasses Company in Houston.
Q. And in what capacity?
A. I'm the manager.
Q. At the Texas City—rather at the Houston Terminal of Southwestern?
A. Yes, sir.
Q. Now in 1944—in 1944, by whom were you employed?
A. I was employed by Southwestern in Texas City.
Q. And what was your position with Southwestern in 1944?
A. I handled barges, ships and the mangement (sic) of the office.
Q. Were you the manager of the terminal? Is that what you mean?
A. Yes, sir.
Q. How long had you been employed by Southwestern prior to September of 1944 as manager or in any capacity?
[fol. 86] A. Since March, 1939.
Q. Now as manager of the terminal in 1944, did you have to do with the loading and discharging of vessels with molasses cargos?
A. Yes, sir.
Q. Did you have to do with the loading and discharging of cargos of molasses from the barge PETER B?
A. Yes, sir.
Q. Did Southwestern own the PETER B?
A. Yes, sir.
Q. And did Southwestern operate the PETER B?
A. Southwestern operated the PETER B and the International Transportation Corporation owned the barge.
Q. Oh, you say Southwestern operated her and the International Transportation Corporation owned her?
A. Yes, sir.

Q. Do you know on what basis Southwestern operated the PETER B?

Mr. Lemle: Objected to. The charter party is in writing. I demand the production of the charter party.

Mr. Varian: May I say, Your Honor, that, in answer to an interrogatory propounded by Mr. Lemle, the answer was that we did not know whether the charter was in writing or was oral; that any letters or writings were destroyed in the Texas City explosion in 1947.

I might say this, that as counsel for Southwestern, Mr. [fol. 87] Lemle, I passed on the charter across my desk but all I am asking of this witness is on what basis Southwestern operated the barge, if he has knowledge under the circumstances. I submit that he should be permitted to answer.

The Court: I don't know what that means though, "on what basis did they operate it".

Mr. Lemle: Of course, if Your Honor please, the fact that Southwestern's records were destroyed in the Texas City doesn't mean the owner's records were destroyed too and I submit that I'm entitled to see the charter party.

The Court: The charter party has never been produced?

Mr. Lemle: No, sir.

The Court: I'll permit the question. I don't know if he understands it.

By Mr. Varian:

Q. Do you understand the question? On what basis did Southwestern operate the vessel?

A. Southwestern paid all the keep-up of the repairs; painting and other expenses and the International Transportation Company received so much money. How much I don't know.

Q. Do you know what, if any, connection there was between Southwestern and the International Transportation Corporation, Mr. Frielier?

[fol. 88] A. The International Transportation Company was a little company owned by Southwestern Sugar and Molasses Company.

Q. Who was the president of Southwestern?

A. A. R. Kaplan.

Q. Mr. Frielier, do you know whether Mr. Kaplan is still president of Southwestern?

A. Yes, sir.

Q. Who is the president of International?

A. A. R. Kaplan.

Q. Now did I understand you to say that Southwestern paid International some sum of money, how much you don't know, but had the duty of——

Mr. Lemle: I object to counsel leading the witness.

The Court: Yes, don't lead him by stating what the witness said. The witness is competent to take care of himself.

By Mr. Varian:

Q. Now Mr. Frielier, when you stated that Southwestern had the keep-up of the barge, will you explain please what you meant by that?

A. I didn't understand that. Southwestern had——

Q. I thought I was quoting your answer. When you stated that Southwestern had the duty of up-keep——

A. Yes.

Q. —of the barge, will you explain what you meant by that?

A. Any scraping, painting, as well as repairs—small [fol. 89] repairs were made and ordered and paid by Southwestern Sugar and Molasses.

The Court: Where were International's records kept?

The Witness: They were, at that time, before the explosion, in the Texas City Office.

The Court: Were those records destroyed along with the Southwestern Sugar's records?

The Witness: Our entire records were. Part of them were swept in the bay; others were in such condition you couldn't read them. It was just a bundle of—what was left—everything was integrated. We could even not find what was supposed to be in the office and I was out of ten employees; eight were dead.

The Court: But International Transportation's own records were kept in the same place as the Southwestern Sugar's at—is that Texas City?

The Witness: Texas City, yes, sir.

Mr. Lemle: Of course, if Your Honor please, may I

interpolate one thing here. This witness' deposition was taken on October 11th, 1946, at the office in Texas City. It is a lengthy deposition taken from him. I was hailed to Texas bodily to appear and cross examine and did and a [fol. 90] complete deposition was taken from him. Now it is quite apparent that counsel is not satisfied with that deposition and is retaking that testimony and he has a right to do it but I do not think that this loss of the records and the subsequent fire should be stressed. At the time that this witness' deposition was taken originally the records were intact and we were in the office in Texas City.

The Court: The charter party however, was not made a part of that record?

Mr. Lemle: It was not.

Mr. Varjan: And I may say here, Your Honor, that I have read the record very carefully and I did not find any demand in the record by Mr. Lemle that the charter party be produced.

The Court: Well the question was raised here—the statement was made by Mr. Lemle that merely because the Southwestern's records were lost did not mean that the International Transportation's records—the owner's records—were lost, as you put it, but it does appear now that they were lost also, so there is no——

Mr. Ponder: May it please the court, if you would refer to the interrogatories addressed to Mr. Kaplan, he states that both records were lost. It is in the record.

[fol. 91] The Court: I'm talking about this record now. I was asking for the purpose of this record. I just wanted to see what did happen to the records of the International Transportation Company.

Mr. Lemle: If your Honor please, I don't have the slightest doubt they were lost. I don't question that, but the point that I make is that they were available at a time when this evidence could have been produced and wasn't.

The Court: Proceed.

Mr. Varian: Thank you, sir.

By Mr. Varian:

Q. Now Mr. Frielier, your deposition was taken or your testimony was taken in Texas City in 1946?

A. Yes, sir.

Q. And prior to testifying here today did I show you the record of your testimony?

A. Yes, sir.

Q. And ask you to read it and familiarize yourself with it and to refresh your recollection from it?

A. Yes, sir.

Q. And yesterday in Mr. Ponder's office did you go over the facts and circumstances with me and Mr. Ponder in preparation for your testimony this morning?

A. I did.

[fol. 92] Q. Now Mr. Frielier, prior to September, 1944, how long if you recall, did Southwestern operate the PETER B?

A. A year and a half.

Q. In what service was she employed by Southwestern?

A. In the service of River Terminals hauling——

Q. Did she haul molasses?

A. She hauled molasses——

Q. —or did she haul oil or what?

A. No, she hauled molasses from New Orleans to Texas.

Q. Was the vessel used at anytime to your knowledge for offshore work?

A. No.

Mr. Varian: May we, at this time, Mr. Lemle, read into the record the dimensions or the formal data in connection with the PETER B?

Mr. Lemle: Yes, sir.

Mr. Varian: I think we might stipulate with Mr. Lemle's consent that the barge PETER B is a welded steel barge one hundred and seventy five feet long, twenty-six feet wide and eleven feet deep.

(Mr. Varian and Mr. Lemle consulted.)

Mr. Lemle: Well, I object to that. The barge is not a welded steel barge; it is a riveted barge and if we're going to put the information in, why I've no objection to putting [fol. 93] in the information, but I certainly object to putting in information from somebody else's report that it is a welded barge when she is a riveted barge. All those—this is an old, old ABL, American Barge Line 109 and she is a riveted barge.

Mr. Varian: Do you stipulate, Mr. Lemle, that this blueprint which I have produced is a blueprint showing a profile and a plan location and respective tanks of the vessel and showing her overall dimensions?

Mr. Lemle: Yes.

Mr. Varian: I will offer in evidence, "Libellant's Exhibit 1", a blueprint showing the physical characteristics of the barge PETER B.

The overall dimensions of the PETER B is that the barge is a hundred and seventy-five feet long, twenty-six feet wide and eleven feet deep. The barge has eleven tanks. Three of the tanks are round cylindrical tanks set in rotation in the center of the barge and the other eight ranks (sic) are rectangular tanks, four on each side of the barge. The barge has a forward dry rake and an after dry rake and immediately forward of the after dry rake is located a small pump house, part of the superstructure of which is above the deck.

By Mr. Varian:

Q. Now Mr. Frielier, could I turn your mind back to September, 1944? Do you recall the loading of the barge PETER B with molasses at Reserve, Louisiana?

[fol. 94] A. Yes, sir.

Q. At what terminal was she loaded?

A. At Godchaux's terminal.

Q. Who supervised the loading?

A. Myself with an assistant.

Q. Were you personally present during the course of the loading? A. Yes, sir.

Q. Do you recall the date the barge arrived at Reserve and was tendered for loading of cargo?

A. September 16th, 1944.

The Court: What is the date?

Mr. Varian: September 16th.

The Witness: September 16th.

By Mr. Varian:

Q. Were you present when the barge arrived?

A. Yes, sir.

Q. Was she light on arrival?

A. She was light on arrival.

Q. Did the barge arrive in tow, and if so, in tow of what tug or what company, if you recall?

A. It was a tug of the River Terminals but I do not remember the name of the tug.

Q. Do you recall how the barge was made fast at the Gochaux Terminal?

[fol. 95] A. Yes, sir.

Q. Well, will you state how it was brought in and how it was made fast; which side of the barge if you remember was to the pier or wharf?

A. The starboard side was next to the wharf.

Q. Now from that point, Mr. Frielier, would you explain to the court the circumstances surrounding the loading of the barge?

A. Well, previously there had been a—quite a flood around the Mississippi and lots of water had come down which damaged the piling on the dock and there was quite a current and they had rather a bit of trouble in spotting or docking the barge and it was finally slammed in, fairly hard, into the dock.

Q. Will you carry on and state how the barge was loaded? I assume the barge was loaded at that terminal. What you did.

A. Well, my assistant took all the manholes off the various tanks; I checked each tank, if the tank was dry. After that, we took the ullages off the shore tank in order to establish how much molasses would be pumped into the barge. After that was completed we started loading from aft to forward.

Q. Were the manholes removed from the forward and after rakes?

A. No, sir.

Q. The manholes were removed, however, from the cargo compartments; is that what you meant?

A. Yes, sir, that is what I meant.

Q. And what was the condition of the cargo compartments?

A. They were completely dry.

[fol. 96] Q. Now you stated that you commenced loading from forward to aft. Is that what you testified to?

A. No, from aft to forward.

Q. Oh, from aft to forward?

A. Yes, sir.

Q. Mr. Frielier, do you recall the occurrence of any unusual incident during the course of loading of the barge?

A. Yes. We had almost completed loading the barge and we were pumping into starboard number two and I heard a noise. I sent my helper in the hold and asked him to see what was the matter down in there and he came out and reported that there was a crack about five inches wide——

Mr. Lemle: Objected to. It's hearsay. I might add the surveyor——

The Court: The objection is sustained.

By Mr. Varian:

Q. Well after you heard this noise in starboard number two, did you continue to load cargo in that tank?

A. No, sir, I stopped at once from that tank and switched over to port one. In the meantime I sent the assistant to the engine house to stop the pumps.

Q. How much cargo—strike that please. Did you check personally to see how much cargo was loaded in the number one—in the number two starboard tank?

A. No, sir, I didn't personally.

Q. Did you check personally to see how much cargo was loaded in the other tanks on the barge?

[fol. 97] A. Yes, sir, I made the—on each one I made the ullage report, yes, sir.

Q. Now did you personally take an ullage report on starboard number two?

A. Yes, sir.

Q. And on port number one?

A. Yes, sir.

Q. Now, at the time your deposition was taken at Texas City in 1946, did you make a sketch—a rough sketch showing the various tanks of the vessel and the ullages as you had recorded them?

A. I made a rough sketch at the time of loading and that is part of it.

Q. Well, would you look at this sketch please and tell us whether that is the sketch you made in 1946?

A. Yes, sir.

Q. And does it correctly reflect the ullages of the various tanks?

A. It does.

Q. Now do you know what the depth of the various tanks on the vessel——

A. They are eleven feet.

Q. Do you know what the depth is of the various tanks on the vessel?

A. Yes, sir.

Q. Will you state what the depth is? Of each tank.

A. The tanks are eleven feet with the exception of the round tanks. I don't know exactly how much they are.

[fol. 98] Q. By that do you mean that the outside rectangular tanks have an eleven foot depth?

A. That's right.

Q. Now when you say ullages, what do you mean by that? What does an ullage represent?

A. I took the free space between the deck and how far—up to the molasses level.

Q. From the inside of the deck to the top of the molasses in the respective tanks; is that what you mean?

A. That's right. That's correct.

Q. And the difference between that measurement and eleven feet represented the innage or what was in the tank?

A. Yes, that's right.

Mr. Varian: At this point I'd like to offer this sketch in evidence as "Libellant's Exhibit-2".

Mr. Lemle: Okay.

The Court: Let it be admitted.

By Mr. Varian:

Q. Now will you look at this sketch "Libellant's Exhibit-2", Mr. Frielier, and state how much molasses or how many feet of molasses was in the forward number one and forward number two tanks of the vessel?

A. Well the—on this sheet here I show that there was ten feet free space and nine feet on starboard side number two and nine feet ten on port side.

[fol. 99] Q. Well how much molasses— Actually, how much cargo did you have in number two starboard tank?

A. Well, about a foot.

Q. And in number one?

A. A little more than that; a foot and—a foot and a half.

Q. And approximately how much cargo did you have in the other tanks of the vessel?

A. I had as much as seven foot or eight foot of molasses in them.

Q. That's a rough approximation of the molasses in each of the other rectangular tanks; is that correct?

A. Yes, sir.

Q. Now on conclusion of the loading of the cargo, were the shore gauges measured; did you see what the out-gauge was?

A. Yes, sir.

Q. And who measured them? Did you measure them yourself?

A. I measured them with the help of one of the officials of Godchaux's and made the tape measurement.

Q. Was any report of the gauge readings, the opening and closing gauge readings made at that time?

A. Yes, sir.

Q. Was that report signed by you?

A. It was.

Q. Was it signed by a representative of the loading terminal?

A. Yes, sir.

Q. Now I show you a paper being the top paper of a sheath of documents entitled "Report Number One—Reserve, Louisiana, September 16, 1954" and I'll ask you what it is.

[fol. 100] The Court: '44?

Mr. Varian: Sir?

The Court: Isn't it '44?

Mr. Varian: Yes, sir.

The Court: You said '54.

Mr. Varian: Oh, did I say that?

The Witness: This is the gauge—the opening and closing gauge report in Reserve where the opening shows

174,203 gallons; the closing gauge 34,045, which means that we pumped into the barge 140,158 gallons and this was signed by myself.

By Mr. Varian:

Q. Mr. Frielier, this is obviously a copy, a carbon copy?

A. Yes, sir.

Q. Was there a signed copy or a signed duplicate original delivered to you——

A. Yes, sir.

Q. —or retained by you after the loading?

A. Yes, sir.

Q. What was done with it?

A. Well, it disappeared in the Texas City Disaster.

[fol. 101] The Court: How many gallons did you say it shows?

Mr. Varian: 140,158 gallons, sir.

By Mr. Varian:

Q. Now referring to this sheath of papers can you state whether you delivered it to me recently?

A. No, I didn't.

Q. Do you know what it is?

A. Oh, yes, this is a complete report, letter by letter, on the PETER B, which copies were made in the office and I believe—I'm quite sure I mailed one of this to—to a surveyor in Houston.

Q. Do you recall the name of the surveyor these reports were delivered to?

A. I believe his name was Mr. Lambdin, yes.

Q. Will you state Mr. Frielier, whether this compilation of reports was made in the regular course of the business of southwestern?

A. We keep a regular log on things happening during the entire year and these records are put in the files and when they're needed, pulled out.

Q. Was this copy of those reports made at the request of surveyor Lambdin?

A. Yes. He asked me for a survey and when I told him I had all of the information on what happening and mailed him this—this book.

Q. Were the originals of the reports referred to in this [fol. 102] sheath of documents made and filed and kept in the regular course of Southwestern's business?

A. That's right.

Mr. Varian: I think I'd like to have this marked for identification at this time, if I may sir, then later I will separate the mess.

The Court: You just want it marked? How do you want it marked?

Mr. Varian: For identification for the time being, "Libellant's Exhibit C".

Well now, I would like also to mark at this time the top sheet. That was the point of marking everything for identification, because there is some material in here that's not relevant.

I would ask that the top sheet be marked as "Libellant's Exhibit C" in evidence.

Do you have this?

Mr. Lemle: Yes, I have a complete copy of it.

I might say for information how I got them. When we took Mr. Lambdin's testimony in Houston, Mr. M. A. Grace complained that all his records had been burned up to which Mr. Lambdin said, "Well, I have a pretty complete file on this and I'll give each of you gentlemen what I have." and he handed one to Mr. Grace and he handed one to me and that's where they came from.

[fol. 103] Mr. Varian: The record shows Mr. Lemle reviewed the file and said, "Mr. Grace, I'm not interested." so he didn't offer it. I, at this time, will offer the top sheet and such other documents as may be material——

Mr. Lemle: No, you'll have to offer them one by one. There may be some I want to object to.

Mr. Varian: Very well.

The Court: How are we going to know which are material and which are not? We can't just——

Mr. Lemle: Well if Your Honor please, some of them are just unquestionably material. I don't deny that. Some of them have the rankest sort of self-serving statements in them and some of them are admissible——

The Court: I don't see how the offer can be made "we'll offer whatever of these happen to be relevant". I don't see how we can make an offer like that.

Mr. Lemle: I say we have to offer them one at a time.

Mr. Varian: That's what I have to do. That's why I marked them for identification.

[fol. 104] I might say this Your Honor, that I believe I have established these to be reports kept in the regular course of Southwestern's business and as such are admissible subject, however, to the court's weighing the probative value of it.

Mr. Lemle: If Your Honor please, I submit that Southwestern is not in the business of sinking barges. To the extent that they are made in connection with their business, they are perfectly relevant but the statements—what—Mr. Frieler's opinions as to what caused it to sink and such things as that are no part of the business records of Southwestern and are not admissible.

The Court: You have not indicated that you're going to raise any objection except to those which are not relevant. In other words, you're not going to object to them on the grounds that they are not the original documents and so forth.

Mr. Lemle: Oh, no. Oh, no. I don't have the slightest doubt as to the authenticity of the gentleman who produced them, Mr. Lambdin. I have complete faith and I have no doubt as to the authenticity.

The Court: All right.

By Mr. Varian:

Q. Let me ask you this, Mr. Frieler. Do you keep a log of incidents which occur in the regular course of business of Southwestern?

[fol. 105] A. Oh, yes.

Q. If you load a barge and discharge a barge and nothing happens except that you put so much in and then somebody sends out a bill to somebody for it, is the record made of that?

A. Yes, sir.

Q. If anything happens during the course of the discharge—if you're loading a tank car and it foams over

and the railroad company makes a claim against you, do you make a note of that?

A. Oh, yes, sir.

Q. Is that made in the regular course of your business?

A. It is done.

Q. If a barge that you had arrived at your terminal and that barge sank before you could discharge it, would you make a note or a report of that?

A. Oh, yes, I would make a report.

Q. And would you make that report in the regular course of your business?

A. That's right.

Q. And keep it and file it in the regular course of your business?

A. That's right.

Q. Now Mr. Frieler, were you present during the entire course of the loading?

A. Yes, sir.

Q. —of the barge at Reserve, Louisiana?

A. I was, yes, sir.

[fol. 106] Q. Were you present at the time the barge left Reserve, Louisiana?

A. No, sir.

Q. Do you recall whether or not you stood by at the loading terminal after the completion of the loading of the barge?

A. Yes, sir. I went into the office of Godchaux and put in a call for the River Terminal at New Orleans but I was not successful in obtaining the office.

Q. What was the purpose of your trying to contact River Terminals, Mr. Frieler?

A. I wanted to tell them about the leak on the PETER B.

Q. And that was the leak in the forward tank number two starboard side?

A. That's right.

Q. Now after you—strike it please. Where is the River Terminal's office in New Orleans? Do you know?

A. I do not know where it was at that time.

Q. But they do have an office in New Orleans?

A. Yes, sir.

Q. Now do you recall what day September 16th was?

A. September 16th was on a Saturday.

Q. And did you check it out with me yesterday?

A. Yes, sir.

Q. Now after you shut down the pumps, when you ascertained that there was a leak in the number two starboard tank, was any further cargo loaded into the barge PETER B?

A. No, sir.

[fol. 107] Q. Now after the gauge readings were made which you testified to, what did you do? Where did you go?

A. I went back to New Orleans.

Q. Did you subsequently return to Reserve?

A. The next morning on my way home I came by Reserve and went on the dock and asked the guard there how the PETER B looked when she was leaving the dock there and he said——

Mr. Lemle: Objected to. It's hearsay.

The Court: The objection is sustained.

The Witness: And he said she was——

The Court: Don't say what he said.

Mr. Varian: Just a minute, Mr. Frieler. You can't say that.

The Witness: I'm sorry.

By Mr. Varian:

Q. Do you know what time the barge left the dock at Reserve on Sunday morning?

A. At 5 o'clock.

Q. What time was it that you arrived at Reserve on your way home as you put it?

A. Nine o'clock.

Q. In the morning?

A. Yes.

[fol. 108] Q. Now for the record, where do you live? Where did you then live, Mr. Firler? (sic)

A. I was living in Texas City.

Q. What tugboat company towed the barge away from Reserve after it was loaded? Do you know?

A. The River Terminals' tug.

Q. How long did you say it was that the PETER B had been in Southwestern's service?

A. A year and a half.

Q. During that time had the PETER B made any trips through the Intracoastal Waterway?

A. She made roughly from twelve to thirteen trips.

Q. Do you know who towed her on those occasions?

A. It was always the River Terminals' tugs.

Q. Did you ever have any other tugboat company tow the barge PETER B on these trips between Reserve and Texas City?

A. Not that I know of.

Q. Do you know the name of the tug that took the PETER B out of Texas City on—from Reserve on September 17th, 1944?

A. No, I don't.

Q. Now, on the following day— It was loaded on September 16th. Now on the following day of September 17th, when you went to the terminal about 9 o'clock in the morning, did you make any attempt to again contact River Terminals Corporation?

A. Yes. Early in the morning before I left I tried again and could not get anybody.

Q. Where did you go from Reserve?

A. From Reserve I went to Baton Rouge, had lunch there [fol. 109] and sent a telegram.

Q. To whom did you send the telegram?

A. I sent the telegram to Mr. Kaplan in New York.

Q. Mr. Kaplan being the president of Southwestern?

A. Yes, sir, president of Southwestern Sugar Lines.

Q. Did you keep a copy of that telegram?

A. I did.

Q. Was it filed with your records at Texas City?

A. It was.

Q. And was it destroyed with the others?

A. Yes, sir.

Q. Would you look at this document; report number 5, in this sheath of papers and tell the court whether that is a true copy of the telegram that you sent to Mr. Kaplan?

A. Yes, sir, this is a copy of it.

Mr. Varian: I'll offer it as "Libellant's Exhibit D".

Mr. Lemle: If Your Honor please, I submit that part of it is relevant and part of it is not. The closing sentence is not,—as to the cause of the leak is clearly not relevant.

Mr. Varian: I might say——

Mr. Lemle: The first part is perfectly relevant.

Mr. Varian: I might say this Your Honor, that it is an old case and we're trying to shed as much light on it at this [fol. 110] time as we can and the way to shed light it seems to me is to get documentation of the events as they occurred at or about the time of their occurrence. I'm sure the court wants that.

Mr. Lemle: I've no objection to that.

The Court: Does the sender of the telegram express an opinion as to what caused the leak?

Mr. Lemle: Yes.

Mr. Varian: No, sir.

Mr. Lemle: Yes.

Mr. Varian: May I ask the court to look at it?

Mr. Lemle: If he strikes the closing sentence out I have no objection to it.

The Court: Well, he doesn't express an opinion; it's just——

Mr. Varian: We make no claim, sir, that this damage in suit was the result of striking a submerged piling and with that concession, Mr. Lemle, is it all right.

Mr. Lemle: With that concession I'll withdraw my objection.

[fol. 111] The Court: All right.

By Mr. Varian:

Q. Now from Baton Rouge, where did you go, Mr. Frieler? Just explain from that point on where you went and what you did and let's see if we can shorten this up.

A. From Baton Rouge, the incident was on my mind and during the trip I made up my mind that I would go to Houston and see the River Terminals' people there personally.

The Court: What incident was in your mind?

The Witness: About the leakage.

By Mr. Varian:

Q. Continue please.

A. All right. That evening I arrived rather late in Houston. I went to the hotel and the next morning I went to the River Terminals about ten o clock and I saw Mr. Hinkle in person. I told him about the leak, where it was located, how high it was, how high it was from the waterline and so on and told him that I was worried about it and for him to get in touch with their New Orleans office and to report it immediately and he took notes and told me that he would get in touch with them at once and he showed me on the wall a tug movement list and he said, "Well, I have plenty time to give New Orleans this information since the tug is not made up and will not leave until Tuesday next week."

[fol. 112] The Court: "Will not leave until Tuesday of next week"?

The Witness: Well, that same week.

The Court: The next day?

The Witness: Yes, that's right. That's Tuesday, yes.

By Mr. Varian:

Q. Was this Captain Hinkle, I believe, that you talked to?

A. I don't know——

Q. Do you know the gentleman is Captain Hinkle?

A. No, I didn't know that he was captain.

Q. Do you know——

The Court: You knew he was Mr. Hinkle? Is that what you said? You called him Mr. Hinkle?

The Witness: Yes.

The Court: You knew his name was Hinkle?

The Witness: Hinkle, yes, H-I-N-K-L-E.

By Mr. Varian:

Q. Do you know what connection he had with River Terminals?

A. Why he must have been the boss in that office.

Q. Did Captain Hinkle say anything to you about the tow being made up at Harvey?

[fol. 113] A. Yes, sir, it would be made up in Harvey.

Q. And did he say anything about the tow?

A. Yes. He also told me not to worry about it; that each of the tugs had a pump on it and they could put the pump on the barge and pump water or whatever it was out of it and I asked him to give me reports from time to time as to the movement of the barge.

Q. Did you advise Captain Hinkle at that time that you were planning to go to McAllen on the 21st?

A. Not at that day. I didn't know I had to go to——

Q. All right. Did Captain Hinkle say anything about writing a letter to his people at Harvey?

A. Well he made some notes of it and if he wrote or if he telephoned I don't know.

Q. Now let me ask you this, Mr. Frieler, is Houston on your way home to Texas City from Reserve?

A. No. By going direct from Beaumont to Texas City I would gain about two hours.

Q. This conversation took place on Monday, September the 18th?

A. Yes, sir.

Q. Now from Captain Hinkle's office did you go to the terminal? yourself; Southwestern's terminal?

A. I went to our Texas City Terminal, yes, sir.

Q. At your arrival at Southwestern's terminal, did you dictate a report or a memorandum of your conversation with Captain Hinkle?

A. I sure did.

[fol. 114] Q. Would you look at this document which is called "report number six" and state whether that is a copy of the report that you made?

A. That's it.

Q. Was the original of it signed by you?

A. Yes, sir.

Q. And was the original filed and destroyed in the explosion?

A. That's right.

Q. And was this copy that I showed you——

Mr. Lemle: Put it in. I have no objection to it.

Mr. Varian: All right, sir, I was just anticipating one. I'll offer the report as "Libellant's Exhibit 5".

The Court: Let it be admitted.

Mr. Lemle: Six.

The Clerk: I don't think so.

The Court: How about the copy of the telegram? Did you get that in?

Mr. Varian: Yes, sir. That was four.

Mr. Lemle: Excuse me, I was looking at the number of the report. That is six.

[fol. 115] The Court: All right, let it be admitted.

By Mr. Varian:

Q. Who is or who was Mrs. Wertenberger in your office?

A. Mrs. Wertenberger was more or less my right hand man. When I was out of town or when I was not in the plant or so on, she would take telephone calls, write memos of what happened and handle the part of the bookkeeping department. She invoiced invoicing and so on. She actually relieved me with lots of detail work—relieved me of lots of detailed work.

Q. Did she have any familiarity with barge equipment?

A. No.

Q. Or marine equipment?

A. No.

Q. Would you say that she was a clerical employee?

A. Yes, she was a clerical employee.

Q. Who is Captain Wynne of Houston?

A. Captain Wynne is the surveyor in Houston.

Q. Did you receive a ~~tele~~phone call from Captain Wynne at sometime after you returned to the plant on Monday?

A. Yes, on—I believe it was Tuesday.

Q. That would be September, then, the 19th, 1944?

A. Yes, sir. He called me and asked for the details of the leak in the barge PETER B and I gave them to him.

Q. Did you inquire how Captain Wynne came to telephone you and ask you for details of the leak?

A. I don't know how he got them.

[fol. 116] Q. And you advised him of the details of the leak?

A. Yes, sir, I gave him full details.

Q. Did you have any discussion on the telephone with

Captain Wynne as to the discharge of the cargo from the barge?

A. No, not at that time.

Q. Do I understand that you left for McAllen on September 21—that would be Thursday—1944?

A. Yes, sir.

Q. Your answer was——

A. Yes, I received a telegram from Mr. Kaplan to proceed to McAllen with one of Brown and Root's men to look at property in McAllen.

Q. Did you have any communication with Captain Hinkle prior to the time you left for McAllen on September 21st?

A. Yes, as far as I can remember on Wednesday I called Mr. Hinkle and told him that I had to go to McAllen and asked him to give me a report on the PETER B, but he said he had not heard anything and I considered then that no news was good news.

Q. Did he tell you in substance not to worry about it; everything was all right?

A. That's what he did, yes, sir.

Mr. Lemle: If Your Honor please, I object to that as being the rankest kind of a leading question.

The Court: It certainly was but he answered it.

[fol. 117] Mr. Lemle: I move to strike the answer because he answered it before I could object to it.

The Court: All right. I think you should go back and ask him what was.

Mr. Varian: I think so too, sir. I'm sorry. I was just trying to shorten things up here.

By Mr. Varian:

Q. Would you repeat as nearly as you can recall, Mr. Frieler, the conversation that you had with Captain Hinkle; what he said to you and what you said to him?

A. I told him that I had to go next day to McAllen and that I want to inquire about the PETER B; where she was and how she was doing. He told me that he did not know where she was at that time but not to worry about.

Q. Prior to the time that you left for McAllen on September 21st, did you have any further conversations with Captain Wynne?

A. Yes, on Thursday sometime before noon Captain Wynne called me and wanted to know when the barge was coming in and I told him I didn't know but I also told him then that I had to leave next day for McAllen and that I would leave the same afternoon. Mr. Wynne told me that he would come at once to Texas City and would have a discussion with me about the PETER B.

Q. Was there anything said at that time as to the dis-
[fol. 118] charge of the barge after she arrived?

A. No. Mr. Wynne came in at 4 o'clock and while we were sitting in my office he mentioned that I must not unload—that we must not unload the barge until he had seen her and had taken samples of the tanks.

Q. Then I take it that Captain Wynne followed the telephone conversation by coming down to the terminal; is that correct?

A. That's right.

Q. And that you had a discussion with Captain Wynne in your office?

A. Yes, sir. And since I had already packed and everything and was leaving to McAllen, I took Mr. Wynne to Miss Wertenberger's desk and I said, "Now Miss Wertenberger, these are the instructions of Mr. Wynne; that he don't want us to unload the barge until he has seen it and taken sample of it."

Q. Thereafter did you depart for McAllen?

A. Yes, shortly afterwards I left for Corpus Christi.

Q. I'm ignorant about it. Tell me, is Corpus Christi on the way to McAllen?

A. Yes, Corpus Christi is half-way to McAllen, sir.

Q. When did you arrive at Corpus Christi?

A. Oh, I imagine about—before 12 o'clock sometime, midnight.

Q. Did you advise Miss Wertenberger as to what hotel you intended to stay at in Corpus Christi?

A. Yes, at the Plaza Hotel.

[fol. 119] Q. When did you check out of the Plaza Hotel?

A. The next morning and left for McAllen.

Q. That would be September the 22nd?

A. Yes, sir.

Q. Now what is the next thing, Mr. Frieler, that you heard about the PETER B?

A. On my way back on Sunday while I let Mr. Dickerson out of the car, his wife told me that Texas City had been calling me and to go get on the—and to call back our office.

Q. Now who is Mrs. Dickerson?

A. Mrs. Dickerson is the wife of Mr. Dickerson and he is the engineer for Brown and Root.

Q. And Mr. Dickerson had gone to Corpus Christi with you; is that right, from what I understand?

A. Yes.

The Court: Where did you get this message that they were calling you?

The Witness: In Houston.

By Mr. Varian:

Q. What time and what date did you arrive in Houston and get this message from Mrs. Dickerson?

A. That was Sunday afternoon about—close to 3 o'clock.

Q. And Sunday is the 24th of September, 1944?

A. Yes.

Q. Did you telephone the terminal?

[fol. 120] A. Yes, sir.

Q. Who did you talk with?

A. I talked to Miss Wertenberger and she advised me that PETER B was submerged up to the valve stem of the barge—that is about five feet from the motor house or pump room that we call it.

Q. The pump room is at the after end of the barge; is that correct?

A. That's right.

The Court: You mean the bow was submerged?

The Witness: The bow was submerged, yes, sir.

By Mr. Varian:

Q. Then what did you do? Just carry it on from there and see if we can shorten it up. What did you do from that point?

A. Well Captain Wynne asked me to take some samples of the mixed water and molasses and I took the Briggs or Baume test and since the Baume test was over 39, I let him go ahead and pump into the shore tanks.

Q. Well you went down to the terminal and I take it that you went down to the slip where the barge was and you looked at it; is that correct?

A. That's right. Yes, that's correct.

Q. And I take it from what you said that you found Captain Wynne down there when you arrived?

A. That's right.

[fol. 121] Q. What time did you get down there? Do you recall?

A. It was around 4 o'clock.

Q. Sunday?

A. Yes, sir.

Q. Now, was any part of the molasses pumped ashore into your shore tanks?

A. Yes, sir.

Q. Do you know approximately how much?

A. I don't know exactly.

Q. Was it a large quantity or was it a small quantity?

A. Well to compare to the cargo, it was small.

Q. Was pumping discontinued at anytime while you were there on Sunday afternoon?

A. Yes, sir.

Q. For what reason?

A. Well as soon as the Briggs—well the Baume was lower than 39; I discontinued the pumping into shore tanks and we started pumping over the side.

Mr. Varian: For the information of the court, I think we might say that Briggs is a molasses term taken from a gentleman by the name of Briggs. It is roughly similar to specific gravity but not quite but roughly.

By Mr. Varian:

Q. Now Mr. Frieler, if the Briggs Molasses drops below 78, is there a danger of fermentation?

A. Yes, sir, you will have reaction and you will have fermentation.

[fol. 122] Q. It is a chemical reaction?

A. Yes, sir, it is a chemical reaction.

Q. Now, subsequently were attempts made to raise the barge?

A. Yes, we pumped all night with our own equipment and tried to keep the pump house out of the water and later on, when our pumps failed, I hired the Republic—a pump from the Republic Company to go on and keep the pump house out of the water.

Q. Do you recall whether pumping was continued through during the course of Sunday night, September 24?

A. Yes, sir.

Q. Do you recall whether or how late you stood by at the terminal that evening?

A. I stood by all night.

Q. Do you recall whether Miss Wertenberger was present at the terminal Sunday evening?

A. Yes, sir.

Q. Do you recall how long she stood by?

A. She worked up to ten o'clock.

Q. Did you make any attempts to communicate the occurrence by telephone to Mr. Kaplan in New York?

A. Yes, sir. We tried from the time I arrived and I finally got him at 10 o'clock that night.

Q. Did you make any inquiries of Miss Wertenberger as to what had happened in your absence?

A. When I came back and saw the situation I asked Miss Wertenberger to make a com—to sit down and make a complete report of what had happened and sit down on [fol. 123] the typewriter and write down all the details.

Q. Did she do that?

A. Yes, sir.

The Court: Is that the lady who is outside?

The Witness: Yes, sir, Mrs. White. The lady is now married and her name is White.

The Court: I thought it might be.

By Mr. Varian:

Q. After the report was made, do you know whether it was signed by Miss Wertenberger?

A. Yes, it was signed.

Q. And what was done with the original of that report?

A. Well the original was filed and a copy was sent to Mr. Kaplan and we made so many booklets of it.

Q. Would you look at this report designated "report number eleven" dated September 24, 1944, consisting of three sheets and state whether that is a copy of the report that you saw which was signed by Miss Wertenberger?

A. Yes, sir, that's it.

Mr. Varian: Except for the check marks which were unfortunately made on this, I will offer the report in evidence as "Libellant's Exhibit 6".

Mr. Lemle: I object to it as being a self-serving docu-
[fol. 124] ment. The lady is here present in court, ready to testify. I submit that this is not a report made in the course of business at all; it is simply a narrative of what the lady said happened. It has nothing to do with their business at all.

Mr. Varian: I will lay a foundation for it, Mr. Lemle but I thought you wanted me to dispense with it. I have asked Mr. Frieler whether normal loadings and normal discharges were reported; whether the log was kept and whether abnormal or unusual incidents were reported. Mr. Frieler stated in each instance they are reported; it was done in the regular course of business; it was kept in the regular course of business and that this report—if you want me to, I'll go through the motions and ask him whether it was made in the regular course of business.

Mr. Lemle: Well regardless of what he says it was made in, I submit it was not made in the regular course of business and could not be because they're in the business of selling and transporting molasses.

The Court: Well since the lady is present, a more satisfactory method is to get the testimony from her.

Mr. Varian: I'm going to inquire, Your Honor, but I do submit that subject to probative value which is to be determined by her testimony largely, I do submit that it is evidentiary and I re-offer the report.

[fol. 125] The Court: I'll sustain the objection.

Mr. Varian: May I ask that it be marked for identification?

By Mr. Varian:

Q. Mr. Frieler, did you receive the original—strike it please.

I show you a document which purports to be a copy of a letter dated September 21, 1944, received by—from Captain Wynne. I ask you if the original of that was received from Captain Wynne and filed with your——

Mr. Lemle: I have no objection to it.

The Witness: Yes, sir.

Mr. Varian: Thank you, Mr. Lemle.

I'll offer the letter in evidence as "Libellant's Exhibit 7".

By Mr. Varian:

Q. Now Mr. Frieler, when you got down to the plant on Sunday, the 24th, I think you stated that the barge was down by the head—submerged at the head?

A. That's right.

Q. Do you recall whether the head was inshore or outshore in the slip?

A. Well, the——

Q. Just answer the question; whether it was inshore or [fol. 126] outshore.

A. The pump house was facing towards the—towards shore and the forward deck was going out, to outshore.

Q. Well then it was headed outshore?

A. Headed outshore, yes.

The Court: It was in the slip?

The Witness: Yes, sir.

By Mr. Varian:

Q. Did you, yesterday, for me and for Mr. Ponder, make a rough sketch of the slipway, the position of the barge and the facilities at Texas City—the Texas City Terminal?

A. Yes, sir, I did.

Q. Is that sketch that you have in your hand the sketch that you made?

A. Yes, sir.

Q. Does it approximately portray the various positions of the docks and the channel and the vessel?

A. Well,——

Q. Well does it?

A. Yes, it does.

Mr. Varian: I'll offer this sketch in evidence as "Libellant's Exhibit 8".

The Court: What is it?

[fol. 127] Clerk: "8".

Mr. Lemle: I have no objection.

By Mr. Varian:

Q. Do you know Mr. Frieler, how much water there is in that slip?

A. Oh, I would say from twenty-five to twenty-eight feet.

Q. And how do you know that?

A. Because big vessels have taken cargos there.

Q. With twenty-five to twenty-eight foot draft? With twenty-five to twenty-eight foot draft?

A. Yes, sir.

Q. Is there any——

The Court: I take it a ship couldn't use it with a twenty-eight foot draft if it is twenty-five feet. I didn't understand that last question.

The Witness: Twenty-eight feet I will say.

Mr. Varian: I thought I understood twenty-seven to twenty-eight foot. Maybe he didn't say that though.

The Court: All right.

Mr. Varian: I might be wrong.

[fol. 128] By Mr. Varian:

Q. But there is twenty-five feet of water in this slip? You feel confident of that?

A. I do.

Q. And the draft of the barge was approximately how much?

A. Well,——

Q. What was the normal loaded deep-draft of the barge? Do you know?

A. I would say eight feet.

Q. That's a mean loaded deep-draft?

A. Yes, sir.

Q. Is there any shallow water in the vicinity of the slip?

A. Yes, there is shallow water outside the channel.

Q. How far off the head of the pier would you say this shallow water was?

A. Well there is a small island, Snake Island, which is about a thousand feet away from the jee head.

Q. And is that the Snake Island that you've indicated on this diagram?

A. That's right.

Q. Now, was the PETER B subsequently raised?

A. Yes, sir.

Q. And will you tell us what was done to raise the barge? Briefly. Generally.

A. We had the—Mr. Goff had the bid—lowest bid and he started pumping out the barge by water and air and she was finally raised on—on Sunday to Monday, but I don't [fol. 129] know the date; Sunday to Monday.

Q. Well, sometime after——

A. On the 28th I would say.

Q. Sometime after salvage operations started the barge was raised?

A. That's right.

Q. Now what was done after the barge was raised? Was there any survey held or what?

A. I informed the surveyors that she was ready to be inspected.

Q. And what was done? Did the surveyors come down and look at her afloat? Did later they look at her in drydock or what was done? Will you please just continue on.

A. Well the surveyors came down. Afterwards the barge was took to Houston to Port Iron Works and put in drydock.

Q. Now were you present at the drydock at the time?

A. I was.

Q. And were you present during the course of the survey made on the barge?

A. I was.

Q. On drydock. Mr. Frieler, did anything of unusual incident occur which impressed itself on your memory during the course of this drydocking?

A. Well there were quite a few surveyors there and they were, particular one surveyor, he had a hammer and was hammering on one spot and he finally hit the spot so hard that he took out a piece about 10 inches wide and 15 inches long by hammering real hard and when I saw that I became [fol. 130] just a little bit disgusted and walked off and then they had—photographers were there and they took pictures of it.

Q. What was the name of the surveyor who did this? Do you recall?

A. Mr. Lambdin.

Q. Did you make any comment to Mr. Lambdin at the time?

A. Yes, I—I said, "Well first you put a hole in it and then you're going to make a picture of it."

Mr. Varian: Mr. Lemle, do you have a set of photographs that were taken.

(Mr. Varian consulted with Mr. Lemle)

Mr. Lemle: Do you want to exclude Mr. Grant or is it all right for him to come in here?

Mr. Varian: I have no objection to Mr. Grant's presence.

The Court: You mean that this man cut that— How big a piece did you say it was?

The Witness: Yes, sir.

The Court: About 8 x 15; is that what you said?

The Witness: About 8 inches by 15.

The Court: You mean it just came out in one plate? [fol. 131] The Witness: Yes. He hammered so hard and finally he broke it out.

The Court: What was it; a patch?

The Witness: Well it was a piece of steel.

By Mr. Varian:

Q. Mr. Frieler, what kind of hammer did he use? Was it a chipping hammer?

A. Yes, it was a sharp chipping hammer.

Q. Have you ever seen chipping hammers used that way before?

A. Well, I have seen them to chip on it but not to——

The Court: That's what I'm trying to get clear in my mind. Did he take the hammer and cut out a place?

The Witness: That's right.

The Court: Or did he just——

The Witness: He hit it so hard that it finally got the piece out of it.

By Mr. Varian:

Q. Then took a photograph of it?

A. Yes.

Q. I show you this print and ask you if that looks like a print of the photograph that was taken?

A. Yes. This is the hole I saw.

Q. Were there any other little holes?

[fol. 132] A. Yes, there were.

Q. —disclosed in the side?

A. Yes, there were.

Q. Now where on the ship—do you recall in the way of which tank was this hole made?

A. That was on starboard two.

Q. Starboard two?

A. Yes, sir.

Mr. Varian: I would like to offer this photograph at this time as "Libellant's Exhibit—Mr. Lemle, do you have any objection?

Mr. Lemle: None.

Mr. Varian: I'll offer the photograph as "Libellant Exhibit 9".

The Court: Let it be admitted.

Let me see it.

(The photograph was handed to the court.)

By Mr. Varian:

Q. Did you have occasion to go on the deck of the barge after it was put on drydock, Mr. Frieler?

A. Yes, sir. I was on her.

Q. Did you have occasion, prior to the time of her sinking, to go on the deck of the barge?

A. Oh yes, quite often.

Q. Did you see any difference in the condition of the deck of the barge before and after she sunk?

[fol. 133] A. There was noticeable difference. After she came out of the water and was raised, part of the deck was caved in and another part was a little higher.

Q. I show you this photograph and ask you what it shows; what it reflects?

A. Well it reflects that part of the deck was sunk and other parts came up.

Q. Was that condition present before the vessel submerged?

A. No. No, sir.

Mr. Varian: Mr. Lemle, may I offer this? I don't like to use all of your exhibit——

Mr. Lemle: Sure. You can mark them all.

Mr. Varian: I'll offer this photograph as "Libellant's 10".

The Court: Let it be admitted.

Mr. Varian: Thank you, Mr. Lemle.

The Court: This spot where this surveyor hammered this hole in the side; was the barge pretty badly wasted? Was the steel wasted there? About how thick was that piece?

The Witness: I could not say. I really couldn't say.

The Court: Well, those raised spots that you can see [fol. 134] there; is that scale or—let me see that picture.

(The photograph was handed to the court.)

The Court: What are these raised places?

The Witness: Yes, sir, that's scale.

By Mr. Varian:

Q. Now Mr. Frieler, I show you a document attached to this sheath of papers designated report number 11 and I'll ask you what it is.

A. That is the report to Mr. Kaplan as to—as to condition of the barge going from New Orleans to Texas City; that I had not heard anything about the barge——

Q. Well, it's a letter addressed to Mr. Kaplan by you?

A. Yes.

Q. Is that so?

A. Yes.

Q. And was a copy of it kept in your office and was it destroyed in the explosion?

A. That's right.

Mr. Lemle: I've no objection to it.

Mr. Varian: I'll offer it as "Libellant's Exhibit 11."

The Court: What is it; eleven?

Mr. Varian: Eleven.

[fol. 135] The Court: Yes, the photograph was 10.

By Mr. Varian:

Q. Let me ask you this, Mr. Kaplan, (sic) do you know the approximate value of the molasses that was loaded on board the barge at Reserve, Louisiana?

A. Well the price at that time was twenty-one cents so it must have been between twenty-six and thirty thousand dollars.

Mr. Varian: I take it Your Honor does not take proof of damages?

The Court: I'm sorry, I didn't hear you.

Mr. Varian: I take it Your Honor does not take proof of damages but leaves it open and tries the merits.

The Court: That's right.

Mr. Lemle: I didn't hear that last. Excuse me.

Mr. Varian: I say the court doesn't take proof of damages but tries the merits.

By Mr. Varian:

Q. After the completion of repairs by the Port Houston Iron Works, Mr. Frieler, did Southwestern receive a bill?

A. We did.

Q. And do these documents constitute the repair invoices?

A. Yes, sir.

[fol. 136] Q. Were they paid?

A. Yes, sir, they were paid by Southwestern Sugar and Molasses.

Mr. Lemle: I believe I'll ask for my own information, are we going to try this for an interlocutory decree on damages or are we going to take proof on damages at this time? I don't care which we do but I'd like to know what we're going to do.

Mr. Varian: Your Honor, Mr. Lemle here is anticipating my proof. He has questioned the fact that Southwestern chartered the vessel. He has raised an issue here as to whether Southwestern paid for these damages and if they paid for it, obviously then they had the duty to repair and maintain and return in the same condition.

By Mr. Varian:

Q. Did Southwestern pay the bills?

A. Yes, sir, they did.

Q. Do you know that of your own knowledge?

A. I know that.

Mr. Varian: I'll offer the bills.

The Court: Very well.

Clerk: As "Libellant's 12"?

(Mr. Varian nodded affirmative.)

By Mr. Varian:

Q. Now Mr. Frieler, can I carry you back for a moment [fol. 137] to the time of the loading at Reserve? I think you testified that approximately 140,000 gallons was loaded aboard the barge on the occasion of this trip, September 16th, 1944; is that correct?

A. That's correct.

Q. Was that quantity more or less than the usual quantity that was loaded aboard the barge?

A. It was less.

Q. How much was usually loaded aboard the barge?

A. A hundred and fifty thousand to a hundred and fifty-two thousand gallons.

Q. And had you attended the loading of the barge on prior occasions?

A. I loaded all the barges within 90%—90% of——

Q. You mean 90% of the time you did it?

A. Yes, sir, 90% of the time. That's what I mean.

Q. Now on the occasions that you loaded the barge at Reserve, will you state the normal quantities of cargo placed in the forward tanks, number one, number two?

A. The forward tanks, number one and two, normally would be half full.

Q. That would be about five and a half feet of innage and ullage?

A. That's right.

Q. And on prior occasions had you been present when the barge left Reserve?

A. Yes.

[fol. 138] Q. Would you state what the normal freeboard of the barge is forward and aft?

A. The normal freeboard would be 2.5 aft and about 2.8 forward.

Q. And that is with a full cargo of one hundred and fifty to a hundred and fifty-five thousand gallons?

A. That's right.

Q. Is that correct?

A. (Nodded affirmative.)

Q. Now, from what point on the barge do you measure the freeboard?

A. Well the freeboard I measured forward in front of the rake. I mean where the rake starts going back to the pump house, whereas the aft part I would measure right behind the pump house.

Q. Would you sketch on this sheet of paper, Mr. Frieler, very roughly an outline of the barge and show the rakes

and show at which point you took the draft or the freeboard reading?

A. (The witness drew a sketch.)

The Court: Are you finished?

The Witness: Yes.

(The drawing was handed to Mr. Varian.)

By Mr. Varian:

Q. You have marked——

Mr. Lemle: Do you mind——

. . . . . .

[fol. 140] Q. Had you ever, in the past, had occasion to open the manhole covers?

A. No, I never opened them.

Q. Now when I say the manhole covers, I have in mind the manhole covers leading to the dry rakes forward and aft.

A. Yes.

Q. You personally never had occasion to open the manhole covers?

A. No.

Q. —leading to the dry rakes?

A. No, I didn't.

Q. Had you ever had occasion—any previous occasion to pump the rakes?

A. No, I never pumped out any rakes.

Q. Now——

Mr. Varian: Excuse me just a second, Judge.

(Mr. Varian consulted with Mr. Ponder.)

By Mr. Varian:

Q. Mr. Frieler, I show you a document and ask you what it is?

A. Oh, this is the details of the log on the PETER B on cargo number 8.

Q. When was it made with relation to the time of loading?

A. The information was put in on the date when it happened.

Q. On the date——

A. When I loaded the barge and so on.

Q. On the date when the barge was actually loaded?

[fol. 141] A. Yes.

Q. And "Libellant's Exhibit 2"—the sketch, "Libellant's Exhibit 2" showing the ullages; when was that made?

A. When I was finished with the barge.

Q. These two documents together, then were made at the same time?

A. That was one book. I mean it was——

Q. One folder?

A. Yes, it's one folder.

Mr. Varian: I'd like to offer this document as "Libellant's 2A" so they'll be kept together.

The Court: Very well.

Mr. Lemle: May I say a word to you?

Mr. Varian: Sir?

(Mr. Lemle and Mr. Varian consulted.)

By Mr. Varian:

Q. Mr. Frieler, on this document which we offered as "Exhibit 2A" there is an entry, "Arrived Texas City, September 23, 1944, at 12:25—" and then follows either an A.M. or P.M. which is it?

A. That is an A.M.

Q. Well that entry obviously wasn't made right after you loaded at Reserve, was it?

[fol. 142] A. No, that wasn't.

Q. Who made that entry?

A. After the boat came here it was made by—by a clerk in the office here. This over here is my own. This part here in red and as well in—with a pencil. These things were made up by the clerk and put in.

Q. The material in red and in pencil was made by you at the time of the loading and the rest of it was filled in by the clerk in your office?

A. That's right.

Mr. Lemle: What is that; A.M.?

Mr. Varian: A.M.

Mr. Lemle: All right.

Mr. Varian: Now, sir, Mr. Lemle has advised Mr. Ponder and me that he will not argue at the trial but will argue in his brief the question of real party at interest here.

The libel claims on behalf—claims for Southwestern on its own behalf and as charterer of the PETER B. Mr. Lemle has denied knowledge of that or has denied it outright, I forget which. I should like therefore, to state to the court that there was a disposition in part of claim on underwriters both with respect to cargo and hull. I have just received from my office in New York, a copy of the so-called settlement agreement and I see that it is—it bears some signatures, one of which seems to be Mr. [fol. 143] Frieler's and I'll ask him to identify it and state whether that is your signature, Mr. Frieler?

A. That is my signature.

Q. Do you recognize Mr. Kaplan's signature?

A. Yes, Mr. Kaplan's.

Q. You've seen him sign his name many times?

A. Yes, many.

Mr. Varian: I'll offer it as "Libellant's—14".

Mr. Lemle: May I have a minute?

(The court nodded affirmative.)

The Court: Suppose we take a short recess, gentlemen, for about five minutes? You can step down.

(The witness withdrew from the witness stand.)

(The court recessed at 11:45 A.M., May 15, 1956.)

(The court opened at 12:01 P.M. May 15, 1956.)

Mr. Varian: You've read this, Mr. Lemle?

(Mr. Lemle nodded affirmative.)

Mr. Varian: Any objection to it?

Mr. Lemle: No.

Mr. Varian: I'll offer it as "Libellant's Exhiibt 14".

[fol. 144] The Court: What is the document?

Mr. Varian: It is an agreement between Southwestern and International with respect to the insurance——

The Court: Assignment?

Mr. Lemle: On cargo only.
Mr. Varian: Yes, sir, I believe it is on cargo only.

(The witness resumed the witness stand.)

Mr. Varian: Your witness, Mr. Lemle.

Cross examination.

By Mr. Lemle:

Q. Mr. Frieler, on this—at the beginning of your testimony, you made the statement that the PETER B was engaged in the service of the River Terminals. What did you mean by that?
A. The River Terminals towed her.
Q. What you mean is that the River Terminals was performing a towage service for you; not—or for your company and not that she was in the service of River Terminals?
A. We paid the River Terminals so much money for the tow.
Q. To tow the boat for you?
A. Yes, sir.
Q. On this particular loading at Reserve, at Godchaux Sugars, did you load any molasses at all in the cylindrical center tanks?
[fol. 145] A. Yes, sir.
Q. All three of them?
A. Yes, sir.
Q. So that then there was a normal load in the three cylindrical tanks?
A. Yes, sir.
Q. And in four of the side tanks and—or wing tanks you had a normal load of molasses?
A. In six. In six of——
Q. How many wing tanks did you have?
A. There were a total of eight wing tanks.
Q. Eight wing tanks?
A. Yes.
Q. And the six——
A. Six were normally loaded.

Q. Six after or rear wing tanks you had a normal load of molasses?

A. Yes.

Q. And in one and two which are the first two wing tanks forward, you loaded no molasses to amount to anything?

A. In port one and starboard two there was—in starboard was about one foot and in port was about two feet.

Q. So for all intents and purposes those wing tanks were empty when you completed loading?

A. Yes.

The Court: What two tanks were empty? I didn't follow that.

[fol. 146] The Witness: Starboard number one and port—port number one and starboard number two.

Mr. Lemle: That's two forward tanks.

By Mr. Lemle:

Q. Now, forward of those two forward cargo tanks you have a rake compartment?

A. Yes, sir.

Q. Which is a buoyancy compartment?

A. Yes, sir.

Q. Did you look in that?

A. No, sir.

Q. Aft you have another buoyancy compartment; at the stern of the barge. Did you look into that?

A. No, sir.

Q. You were not concerned whether or not those tanks were dry or leaking or what the situation was?

A. No.

The Court: Are those the rake tanks you're referring to?

Mr. Lemle: Yes, sir.

The Witness: Yes, sir.

By Mr. Lemle:

Q. Now you have ridden this barge, PETER B, yourself, have you not, or on the tugs of the towing companies?

A. I believe I rode her one time.

[fol. 147] Q. Is it not a fact that when this barge is being towed that even with the forward rake tank dry, that water will go on deck?

A. No, sir.

Q. That is not a fact?

A. No, sir.

Q. You deny that?

A. I will deny it.

Q. Did you so testify when you testified in Port Arthur on October the 11th, 1946?

A. I never was in Port Arthur.

Mr. Varian: Just a minute. This witness never testified in Port Arthur, did he, Mr. Lemle?

The Court: He can say so if he didn't.

The Witness: I was never in Port Arthur.

Mr. Lemle: I beg your pardon; Texas City. My error.

By Mr. Lemle:

Q. Did you so testify at Texas City when you testified there in October 11th, 1946?

A. Yes, that was on a very rough voyage I made across. The wind was very strong.

Q. Is that what you said?

A. Yes, sir.

Q. I'm going to impeach you now. I'm warning you. Is [fol. 148] that what you said; that the water came on deck when the weather was rough?

A. Some water was coming when it was very rough that day when I was on the barge and made one trip of it.

Q. I'm going to read to you from your deposition, commencing on page 31. I'm going to ask you whether you so testified.

"Q. If in answer to interrogatories filed in this case it has been stated that just before the tug left the barge at Texas City they had examined the rake space and found it free from water, and if as a matter of fact at that time the rake of the barge was about level with the

water, I ask you to state if in your opinion that a condition could exist"—objection by me; continue the question—"with respect to the rake being free from water?"

"A. In my opinion water would come in if she would cross Galveston Bay."

"Q. Assuming now, just for the purpose of this question, that if there was no water in the rake when the tug left her, and if her deck was level with the water, do you think that condition could exist, with the rake space being free from water?"

"A. Yes, I think so."

"Q. Do you understand my question?"

"A. No, I don't think so."

"Q. Assume that the rake space, we are not saying that it was that way, but assume that the rake space was free from water, no water in the rake space, in your opinion, with the barge loaded as she was and with the rake space [fol. 149] free from water, in your opinion would that put her head down so it would be level with the water? Do you understand the question?"

"A. I don't know exactly what you are driving at."

"Q. Well, strike the question."

"Mr. Lemle: No, let the record stand as it is."

"Q. I want you to understand."

You are being questioned by Mr. Grace.

"A. I don't understand it."

"Q. I was to repeat it a number of times until you do. Assume that there is no water at all in the rake space——"

"A. Yes, sir."

"Q. I will just change the question entirely. Assuming that the barge "PETER B" was found, as has been testified, with water coming over the forward deck, and loaded as she was on this occasion, in your opinion would it be necessary for water to be in the rake space forward to put her down that far?"

"A. No, I do not think so."

"Q. In other words, you think the rake could be free of water and she still be down and the water coming over the deck?"

"A. Yes."

"Q. That is your opinion?"
"A. Yes."

Q. Did you so testify?
A. Yes.
Q. So that, even though the rakes were free from water, water would come on the deck of that barge?
[fol. 150] A. Well, water would come in if you had a strong wind and to ship it on top of it.
Q. Well Mr. Frieler, is there anything said there about there being a strong wind? You were asked the question, if the barge were found with water coming on her deck, if that would signify that there was water in the rake and you answered no, in your opinion it would not. Is that a fair characterization of your testimony?
A. I can say this: even if the forward, port one and starboard two—if they were full of water, I do not think it might be lower forward but I do not think that there could be water going into the rake if it is tied down completely.
Q. That wasn't the question, Mr. Frieler. The question was whether water would come on the deck, not where it would go after it got there. The question is, will water go on the deck of that barge when she is lying loaded?
A. I rode that barge one time in my life, right in the beginning, on that date we had a very strong wind and some water came over it and that's the only way I ever saw that barge that some water came up. That's the only time in my life and I do not know what it will do otherwise when I have not seen it.

The Court: Getting back to these tanks, is there a port tank one and a starboard tank one or are the port tanks numbered——
The Witness: Well the port tanks were—the starboard tanks were two, four, six and eight and the port tanks——
[fol. 151] The Court: You had the even numbers on the starboard?
The Witness: Yes.
The Court: I see.

By Mr. Lemle:

Q. Now Mr. Frieler, let's for a minute go over to this hole that the surveyor knocked in the barge. That surveyor was Mr. Lambdin, wasn't he?

A. That's right.

Q. Your surveyor, employed by your company, wasn't he?

A. Yes, sir.

Q. And what space was he examining or hitting with the hammer at that time?

A. He was examining the side plates on starboard number tow. (sic)

Q. And at that spot there were a number of pin holes in the side plate due to wasted condition, were there not?

A. Yes, there were some pin holes.

Q. And that was the area he was tapping?

A. Yes, he was tapping part of that area and below—below the line.

Q. And when he hit it with a hammer, a piece fell out?

A. No, sir. He gave it a fairly good lick; a hard lick with a hammer. That wasn't—it was just—he didn't just tap it, no, sir.

Q. Mr. Frieler, how much experience have you had with barges?

[fol. 152] A. Well, with barges and ships I would say I have unloaded hundreds of them.

Q. But only loading and unloading; nothing to do with maintenance work on the hulls?

A. Yes, I have supervised the scraping and the painting of it.

Q. Have you ever seen a side plate of a barge or a vessel for that matter that had been bent in place; that is, hammered out straight by hitting it hard enough to bend it back straight?

A. No.

Q. You're not prepared to say then, that if a plate is sound that it is impossible for a surveyor to knock a hole in it as you put it?

A. Well I saw Mr. Lambdin put a hole in there. I mean and he used some pretty strong force to get it in there.

The Court: Did he chop that hole in or did he hammer it in?

The Witness: He just hammered it hard and finally, this piece came out.

Mr. Lemle: I believe that's all.

Redirect examination.

By Mr. Varian:

Q. Mr. Frieler, do you know what a chipping hammer looks like?

A. Oh, yes.

[fol. 153] Q. What does it look like?

A. It has a very—it has a very sharp corner on one end whereby you can chip off scale and for welding stuff together, rust and so on——

Q. It has a pointed end, hasn't it?

A. Yes, sir.

Q. It is not a regular hammer, is it?

A. Oh, no.

Q. Mr. Frieler, I think you testified that under a normal cargo you had 000 the PETER B had a freeboard forward of about 2 foot, nine inches; am I correct in my recollection?

A. That's right.

Q. And aft, approximately 2 foot, 5 inches, more or less?

A. Yes.

Q. Under those circumstances do you know whether the headlog on the forward rake was above water?

A. Yes, it was over water.

Q. How far above the waterline would you say the headlog is?

A. About three feet and four inches.

Q. And how do you account for that?

A. Well, this barge has a small curve going forward where the rake starts.

Q. You mean a slight rise forward?

A. Yes, a slight rise.

Q. Now during the time that Southwestern had the PETER B, was any work performed on it to your knowledge?

A. Yes, sir.

[fol. 154] Q. What was done?

A. Oh, about three months before I received the last cargo in Texas City, we had her scraped and painted.

Q. How was that done? Was it put on a dock or was it done afloat?

A. No, sir, it was done afloat.

Q. Do you recall whether the barge PETER B previously suffered any collision damage?

A. Nothing was reported to me as far as I know.

Q. Who is Mr. Tierney?

A. Oh Mr. Tierney at that time lived here in New Orleans and he was Marine Inspector or Surveyor for Southwestern Sugar and Molasses. He worked out of our office here in New Orleans.

Q. He worked out of Southwestern's New Orleans office; is that what you said?

A. Yes, sir.

Q. Where is Mr. Tierney?

A. He is dead.

Q. That is your information?

A. Yes, sir.

Q. Mr. Frieler, is it fair to say that whether or not water washes up on the deck of the PETER B or any barge depends on the wind—the weather conditions in the area in which the barge is being towed?

A. It certainly has something to do with it.

Q. And have you ever had the barge PETER B arrive at—I'll withdraw the question.

Mr. Frieler, were you present when the PETER B was [fol. 155] raised?

A. Yes, sir.

Q. When her tanks were examined, were you present; when they were examined by the surveyors after raising?

A. Yes, sir.

Q. Can you state whether there was any molasses cargo—whether any molasses cargo was found in the forward dry rake?

A. No, sir.

Q. What was in there, if anything?

A. Water.

Q. Have you ever had occasion to open the manhole covers leading to the forward and after dry rakes?

A. No.

Q. What was the condition of the manhole covers leading to the rakes? Were they easily accessible?

A. I closed them once or twice while I was loading the barge here in New Orleans. The dogs—the screws on the dogs, I had a hard time in closing it and I had to have a big wrench and used all my force to close it back again—to close it tight.

Q. In your opinion, could the dogs on the manhole covers be opened by hand power without the use of a wrench or some other tool?

A. It would have to be a strong man. I couldn't do it.

Mr. Varian: I think that's all I have for Mr. Frieler.

Mr. Lemle: I have a couple more questions.

[fol. 156] Recross examination.

By Mr. Lemle:

Q. Mr. Frieler, you stated that when the shore tanks were gauged at Reserve that an official of Godchaux actually used a tape to measure the ullages?

A. Yes, sir, we had—we had a tape which was lowered into the tank. We started at first, the opening gauge let's say five foot, eight and then when—it was a big tank; a fifty-five thousand barrel tank and you would come down to a lower——

Q. And the official who did the gauging was on top of the tank and you were on the ground?

A. No, sir, both of us were on top.

Q. Both of you were on top?

A. Yes, sir.

Q. When you left Texas City to go out of town to McAllen, did you leave written instructions for Mrs. White or Miss Wertenberger?

A. We had——

Mr. Varian: Well now I'm going to object. I think the question is incomplete.

Mr. Lemle: Well, all right.

Mr. Varian: Certainly I don't understand it.

By Mr. Lemle:

Q. I'll ask you this question. By your report number eight, which I hold in my hand, the last paragraph says [fol. 157] this: "Before leaving for McAllen, I left the following instructions to Warda Wertenberger: 9/21/44 "Don't unload barge until two surveyors, one for Molasses and one for barge has seen damage. If you have their permit, you can go ahead and unload."

Did you leave those instructions?

A. Yes. I wrote on a piece of paper and left her a note not to unload it until the surveyor had seen it.

Q. And Captain Wynne was the cargo surveyor, is that right?

A. Captain Wynne? Yes, sir.

Q. And who was the hull surveyor?

A. At that time I didn't know.

Q. Do you know now?

A. Yes.

Q. Who?

A. I think it was Littiker or Whittaker.

Q. Whittaker?

A. Yes, sir.

Mr. Lemle: Thank you.

Mr. Varian: I have one or two more questions.

Redirect examination.

By Mr. Varian:

Q. Mr. Frieler, when you left those instructions with Miss Wertenberger, did you anticipate that the barge would be delivered with her forward end at the waterline?

A. No.

Q. Or certainly with her starboard corner on the waterline?

[fol. 158] A. No, I didn't.

Q. Would you have left such an instruction with Miss Wertenberger if you had anticipated that to be the fact?

A. No, sir.

Q. And in fact, was the instruction or was the memorandum read to you by Mr. Lemle; was that anything more than a report that you made of a conversation with Captain Wynne in the presence of Miss Wertenberger?

A. That's right.

Q. Was that what it was intended to represent?

A. Yes, sir.

Q. Mr. Frieler, the time you rode the barge; I think you stated you rode the barge once?

A. I rode the barge the first time she came across the Galveston Bay.

Q. Would you say the time that you rode the barge across Galveston Bay she was being pushed stern first at a speed of approximately seven miles an hour?

A. I don't know exactly what speed she was traveling but the weather was rough.

Mr. Varian: I have no further questions.

Recross examination.

By Mr. Lemle:

Q. Well, let's go back to this—the memorandum; the same report number eight. When you left, did you also leave Mr. Wynne's telephone number with Miss Wertenberger and tell her to ring him up as soon as the barge came in?

[fol. 159] A. I sure did.

The Court: You testified earlier that Mr. Wynne called and asked when it was coming in and when he came at four o'clock he said not to unload until he could get samples and had seen the barge?

The Witness: Yes, sir, but at that time he left us his telephone number that we could call him anytime.

The Court: I see.

The Witness: And I gave that telephone number to Miss Wertenberger.

Mr. Lemle: I'm going to offer in evidence, report number eight of these reports.

Mr. Varian: I think I have offered it, Mr. Lemle.

Mr. Lemle: Is number eight in?
The Clerk: No.
Mr. Varian: Thank you for doing it, Mr. Lemle.
Mr. Lemle: You're welcome.
Mark it "Respondent-1".
Mr. Lemle: That's all.

[fol. 160] COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Varian: Before Mr. Frieler leaves the stand Mr. Lemle; will you concede that— May I finish for the record, although you understand what I am about to say? Would you concede that this document represents the disposition of the claim by International Transportation Corporation against underwriters in connection with the damage to the barge PETER B? Do you have any objection?

Mr. Lemle: None.

Mr. Varian: I offer this as "Libellant's Exhibit 15".

Would Mr. Lemle concede that the deposition of Lambdin was taken by him on behalf of the River Terminals Corporation?

Mr. Lemle: Yes, sir.

Mr. Varian: Do you intend to offer that in evidence, Mr. Lemle?

Mr. Lemle: I do. Mr. Grace refused to take it and I took it.

The Court: What was that? I'm sorry, I missed it.

Mr. Lemle: I beg your pardon?

The Court: What was that that you took?

Mr. Lemle: Excuse me, judge.

[fol. 161] Mr. Varian: The deposition of Surveyor Lambdin and Mr. Lemle made a rather voluntary statement, "Mr. Grace refused to take it, so I took it." I don't think that I appreciate the significance and force of such statement but I won't object to it further.

Mr. Lemle, would you concede that this is a copy of a letter that was received by Mr. Grace from Mr. Lambdin dated November 28th, 1947?

Mr. Lemle: I submit that when Mr. Lambdin was subjected to cross examination by Mr. Grace, if Your Honor

comes to read Mr. Lambdin's deposition, he testified very fully relative to this matter of corrosion of these studs. I submit if there was going to be any attempt in anyway to alter or impeach his testimony, it should have been done at that time and not now when Mr. Lambdin is not here to explain his letter.

Mr. Varian: I merely asked you Mr. Lemle, whether you concede that this is a copy of a letter sent by Mr. Lambdin to Mr. Grace——

Mr. Lemle: I will concede that this is Mr. Lambdin's signature on a letter addressed to Mr. Grace.

Mr. Varian: Unfortunately I can't produce Mr. Grace. I would like to offer that letter in view of the voluntary statement by Mr. Lemle, which I—I resented somewhat, to be frank, that he took the testimony of Surveyor Lamb- [fol. 162] din because Mr. Grace declined to do it. In view of that voluntary statement, I think that this letter should go before the court. I offer it.

The Court: Well that's not part of the proof in this case. I don't remember that statement. I certainly do not attach any weight to it. It is a question of what the——

Mr. Lemle: Well the fact—I don't have to apologize for that statement. Mr. Grace was in this case for a great many years. I tried to dispose of this case. I tried to get Mr. Grace to get the testimony of Mr. Lambdin and Mr. Wynne, neither of whom were my witnesses and both of whom were his witnesses. Mr. Grace wouldn't do it; he wouldn't tell me whether he proposed to have them on the trial of the case or not and thereupon I took their testimony and Mr. Grace went and cross examined them. They were not my witnesses and perhaps I might have—and to this day they haven't taken the testimony of the other surveyor, Mr. Whittaker.

The Court: Well if you use that testimony they will be your witnesses, won't they?

Mr. Lemle: Sure and Mr. Lambdin is my witness and I propose to use his testimony and I'm objecting at this time to an introduction of a letter relative to a corroded condition of studs on the ground that the proper time to have queried Mr. Lambdin about that was on cross examination and not now when he is not now present.

[fol. 163] Mr. Varian: It goes beyond the corroded condition of the studs, sir; it shows, I think, why Mr. Grace didn't take Surveyor Lambdin's deposition. It shows, at the same time,—well later it will appear why Mr. Grace did not take the deposition or why we are not producing Mr. Grant.

Mr. Lemle has spent considerable time interviewing Surveyor Lambdin and Mr. Grant, obtaining reports perfectly proper. He has a perfect right to go interview every witness he can lay hands on. I do it myself. But nevertheless, I think this explains why Mr. Grace didn't take the deposition.

Now if—in view of Your Honor's statement that you attach no significance to that statement by Mr. Lemle, I'll withdraw it.

The Court: If a witness is equally available to both sides, I don't see how the court can draw any inference from the failure of one or the other not to take his testimony.

Mr. Varian: Thank you sir, then I'll withdraw the offer. I have no further questions.

Mr. Lemle: I have none.

(The witness withdrew from the witness stand.)

Mr. Varian: I would like to offer at this time a certified copy of a report issued by the Corps of Engineers dated July 27, 1951, reflecting the movements of barge traffic [fol. 164] through the Harvey Lock of the Intracoastal Canal and for the convenience of the court, indicate that at such time the barge PETER B traversed the canal it had an indicated deep draft of six feet.

Any objection, Mr. Lemle?

Mr. Lemle: None.

The Court: Let it be admitted.

Clerk: "Libellant's—16".

Mr. Varian: Similarly I offer certified copy of report from the Corps of Engineers dated July 27, 1951, covering the barge traffic traversing the Vermillion Locks and indicating the deep draft of the barge PETER B to be eight feet.

Clerk: "Libellant's—17".

Mr. Varian: May I assume the familiarity of the court with the Intracoastal Waterway?

The Court: Yes.

Mr. Varian: Thank you.

I would like to offer at this time a certified weather report issued by the weather bureau at Galveston, Texas, indicating the time, direction and velocity of the wind between September 23rd and September 24—both those [fol. 165] dates inclusive, 1944.

The Court: (Nodded affirmative.)

Mr. Varian: Objection?

(Mr. Lemle nodded negative.)

The Court: Let it be admitted.

Clerk: "Libellant's—18".

Mr. Varian: I would like to call Mrs. White.

I was wondering, before I start——

The Court: This is probably an appropriate time to stop for the noon recess. We'll stand at recess until 2 o'clock.

(The court recessed at 12:38 P.M., May 15, 1956.)

(The court opened at 2:00 P.M., May 15, 1956.)

The Court: Be seated please. Proceed.

Mr. Varian: I would like to call Mrs. White to the stand.

Warda White, a witness called by and on behalf of the Libellant, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Varian:

Q. Mrs. White, what is your full name please?

A. Warda White.

Q. Would you please try to raise your voice a little bit. [fol. 166] A. Warda White, W-A-R-D-A.

Q. And Mrs. White, before you were married was your name Wertenberger?

A. Yes, sir.

Q. And where do you live?
A. Texas City.
Q. In 1944, did you live in Texas City?
A. Yes, sir.
Q. In 1944, were you employed by Southwestern?
A. Yes, sir.
Q. In what capacity?
A. I was assistant bookkeeper and clerical worker. I typed up reports, the invoices and typed up the checks for the payroll.
Q. Did you have anything to do with the floating equipment; the loading or discharging of floating equipment?
A. No, sir.
Q. Prior to September, 1944, how long had you been employed by Southwestern?
A. I began working March of 1942.
Q. Are you presently employed by Southwestern?
A. No, sir.
Q. When did your employment terminate?
A. In March of 1947.
Q. 1947?
A. Yes, sir.
Q. Are you testifying here today voluntarily, at my request?
[fol. 167] A. Yes, sir.
Q. Prior to your coming here to testify, did you discuss the facts with me and review testimony that you had given by deposition in 1946 at Texas City?
A. Yes, sir.
Q. Mrs. White, during the time of your employment, do you know whether Southwestern operated the barge called the PETER B?
A. Before my employment?
Q. No, at the time of your employment, in 1944 and prior—I'll withdraw these questions and I'll ask this question.
During the time of your employment with Southwestern in 1944, do you know whether Southwestern operated the barge called the PETER B?
A. Yes, sir.
Q. Now Mrs. White, we are inquiring today about the

sinking of the PETER B at the Texas City Terminal of Southwestern in September of 1944. May I ask whether you had anything to do with the loading of the barge?

A. No, sir.

Q. Do you recall whether the barge had previously to September, 1944, been discharged at the Southwestern Terminal?

A. Yes, sir.

Q. On any prior occasions?

A. Yes, sir, it had.

Q. On how many previous occasions approximately would you say?

[fol. 168] A. Well, six or eight anyway.

Q. And in connection with the discharge of the vessel, just what would you say your duties were?

A. I don't understand your question.

Q. Well perhaps it is ambiguous. Let me put it this way. When the barge PETER B arrived on these prior occasions and was discharged, am I correct that your duties were limited to reporting the outturn of the barge and invoicing the various expenses and so on?

A. Yes, sir.

Q. Keeping the account records?

A. Yes, sir.

The Court: Keep your voice up so they can hear you down at the table.

Mr. Varian: Yes, Mr. Lemle has to hear you too.

By Mr. Varian:

Q. Now do you recall the arrival of the PETER B in September of 1944?

A. Yes, sir.

Q. What was the first information that you received as to the arrival of the barge?

A. Well on my arrival at work I was informed that it was in—docked then.

Q. And what date was that? Do you recall?

A. September the 23rd, '44.

Q. And what day of the week was it?

[fol. 169] A. Saturday.

Q. Who advised you that the barge was in the terminal?

A. Joe Garcia.

Q. And who is Joe Garcia?

A. He was an employee of Southwestern.

Q. And so far as you know, what was—what were Joe Garcia's duties as an employee of Southwestern?

A. Well, he helped to unload the barges and loaded trucks; worked in the boiler room. Just worked around—just general work around the plant.

Q. Now did Joe Garcia tell you anything as to the condition of the barge when he reported her arrival to you?

A. Yes, sir, he said there was water coming in up over one corner of it.

Q. And what did you do?

A. I went down to the docks to look at it and that's what was happenind; (sic) there was water coming over one corner.

Q. Well now, let me ask you this. Southwestern Terminal had berthing facilities for barges I take it?

A. Yes, sir.

Q How was the barge—how was the barge placed in the slip or in the berth?

A. Well the engine room was to the front of the slip.

Q. When you say the front of the slip, do you mean toward the shore?

A. Yes, sir.

Q. —or toward the channel?

A. Towards the shore.

[fol. 170] Q. And how did you know it was the engine room?

A. Well I could see there was a motor in there down below.

Q. And the other end of the barge was out, facing towards the channel? It was facing outboard?

A. Yes, sir.

Q. Now which corner of the barge was down to the waterline?

A. The one next to the dock.

Q. And which side of the barge was next to the dock? Do you know the front from the stern of this barge?

A. Well, from where the engine room was it would have been on the right hand side.

Q. Well let me put it this way. The engine room or the pump house was the after end of the barge and the outboard, the offshore, end of the barge was the front end of the barge. Now which side of the barge, looking from the after end forward, out towards the channel, was against the pier?

A. The right hand side.

Q. The right hand side was to the pier?

A. (Nodded affirmative.)

Q. And which corner of the barge was at the waterline?

A. Well that right hand corner at the far side.

Q. The offshore corner?

A. Yes, sir.

Q. And would you describe just what the conditions were as you recall them when you went down and looked at the barge?

A. Well tha' corner was down even with the water so that when the waves came, it splashed up over that corner, up about a foot or maybe a foot and a half.

[fol. 171] Q. And how about the other corner; the other forward corner of the barge, just opposite the one that was down at the waterline? Was that at the waterline or was it above it or——

A. It was about (sic) it.

Q. About how far above the waterline was it?

A. Oh, a foot or a foot and a half, at least.

Q. Was Joe Garcia there when you went down to inspect the barge?

A. Yes, sir, he went with me.

Q. Did you go on board the barge?

A. No, sir.

Q. And after you inspected it, what did you do?

A. I went back to the office and placed calls for Captain Wynne and for Mr. Stovall of River Terminals.

The Court: Mr. whom?

The Witness: Sir?

The Court: Who did you place calls to?

The Witness: Captain Wynne and Mr. Stovall.

By Mr. Varian:

Q. That's S-T-O-V-A-L-L. Who was Mr. Stovall connected with, if you know?

A. The River Terminals of Houston.

Q. That's a towboat company?

A. Yes, sir.

[fol. 172] Q. And who was Captain Wynne, if you know?

A. Well I don't know. I just know he had something to do with it.

Q. I see. Now, at any time previous to this Saturday morning of September 23, 1944, had you met with Captain Wynne?

A. Yes, sir.

Q. Well, will you state the circumstances of that meeting; when it occurred and what transpired?

A. It was before Mr. Frieler left to go to McAllen. He called and came there to the office to talk to Mr. Frieler and I heard their conversation and was with them when they told me that as soon as the barge arrived I was to call him and let him know so that he could come down there to inspect it.

Q. Had you heard anything from Mr. Frieler or otherwise prior to Captain Wynne's arrival, about a leak in the barge?

A. I knew there was some trouble when they loaded it.

Q. Did you know what the trouble was?

A. Well, I wasn't acquainted with—the full details were, no.

Q. Well now, just what transpired at this meeting between Captain Wynne and Mr. Frieler and which I understand took place in your presence?

Do you understand the question?

A. No, I'm afraid I don't. I thought I told you that.

Q. All right. Well now did Captain Wynne and Mr. Frieler have a conversation about the barge, that is, as to when it was to be looked at; surveyed?

[fol. 173] A. Well he was supposed to come down as soon as it was in. I was to notify him as soon as it came and docked and my understanding was that he was to come down to see the barge as soon as it arrived—as soon as I notified him.

Q. Now, to go back to September 23rd, that Saturday morning when you looked at the barge and found one corner at the waterline; you testified that you telephoned Mr. Stovall——

A. Yes, sir.

Q. —and you telephoned Captain Wynne?

A. Yes, sir.

Q. Am I correct?

A. Yes, sir.

Q. And which of those two gentlemen did you reach first on the telephone?

A. Mr. Stovall.

Q. Did you have a conversation with him?

A. Yes, sir.

Q. Would you repeat as nearly as you can remember, the conversation that you had with Mr. Stovall; what he said to you; what you said to him?

A. I told him that the barge was in; that I had been down there to look at it and that there was water coming up over this corner about a foot or a foot and a half and he told me to wait a minute, that he thought that the captain of the tug DOTTIE D that had towed it in there was in his office. So he talked—I suppose—to him for a few minutes and then when he talked back to me he said that the captain said the barge was in that con- [fol. 174] dition when he left it at our docks in Texas City; that it was also in that condition when he picked it up at Port Arthur. So he assured me from that there wasn't any danger of it and I told him that I had been left in charge and I didn't want anything to happen and that I certainly didn't want it to sink and he sort of laughed and assured me that there wasn't any danger of that.

Q. Did Mr. Stovall say anything about the rakes of the barge, as to whether or not the captain had advised him that the rakes of the barge had been inspected and were dry?

A. No, he didn't discuss anything like that.

Q. He just told you that it was all right; not to be alarmed about it?

A. Yes, sir, he assured me of that.

Q. And what time of the morning, if you recall, did this conversation take place?

A. It was between 8:30 and 9:00.

Q. What time did you arrive at the terminal that morning?

A. Eight o'clock.

Q. Now did you, during the course of that day, succeed in reaching Captain Wynne?

A. Yes, sir, that call came through between 9 and 10 o'clock that morning.

Q. And you had a conversation with Captain Wynne about the barge?

A. Yes, sir, I did. I told him that I had been down to see it and the condition it was and that I had called Mr. Stovall and told him the condition it was in and that—the [fol. 175] same conversation I repeated to him that I had had with Mr. Stovall and he said that he wouldn't be down to see it until Monday with Mr. Frieler.

Q. Did Captain Wynne seem alarmed at the fact that water was coming over or washing over the forward right hand corner of the barge?

A. No, he didn't.

Q. Did you tell him that was the condition was you? (sic)

A. Yes, sir, I did.

Q. Are you positive of that?

A. Yes, sir.

Q. Are you positive that you mentioned that to Mr. Stovall also?

A. I am.

Q. In your talk with Mr. Stovall did you mention to him that this was Saturday and that you usually leave the plant at 12 O'clock on Saturday?

A. I did.

Q. And what did Mr. Stovall say about that?

A. Well he just assurred (sic) me there wasn't any danger of us leaving there.

Q. Well now did Mr. Frieler leave word with you as to where he could be reached?

A. Yes, he did.

Q. When he left on the 21st?

A. Yes, sir.

Q. And where did he tell you he would be Saturday morning?

A. In McAllen. He gave me the hotel telephone number there at McAllen.

[fol. 176] Q. And if Mr. Stovall had suggested that there was anything dangerous about the condition of the barge, what would you have done?

A. Well I could have gotten in touch with Mr. Frieler and we could have unloaded it.

Q. Would you have called Mr. Frieler?

A. I would have.

Q. As it was, did you get in touch with Mr. Frieler?

A. No, I saw no reason to when I was assured it was all right.

Q. Did you advise Mr. Stovall that you weren't familiar with the barge and with marine equipment and would not know what to do?

A. Yes, sir, I did.

Q. What time did you leave the plant on Saturday?

A. At noon; 12 o'clock.

Q. Well, before I go further, let me ask you. Was the Southwestern Terminal in Texas City in 1944, was it a large terminal or was it a small one or how would you characterize it?

A. It was just a small one.

Q. How many office employees were there?

A. One other girl besides me.

Q. And what was her name?

A. Olivia Gonzales.

Q. Is she alive today?

A. Yes, sir.

Q. What were her duties?

[fol. 177] A. She did typing and answered the telephone. Such as that.

Q. In Mr. Frieler's absence, who handled the detail at the plant?

A. I did.

Q. Now you left the plant at 12 o'clock noon on Saturday?

A. That's right.

Q. Did you go home?

A. Yes, sir.

Q. Now what was the next, if anything, that you heard about the PETER B and how did it come about?

A. Well it was Sunday morning about 9 o'clock, Olivia Gonzales called me at my home and told me that the Texas City Terminal watchman had notified her that the barge was sinking and she placed a call to me and I got a taxi immediately and went down there.

Q. How far, in point of time, is it from your house to the plant—or was it from your house to the plant by taxi?

A. Probably a mile and a half.

Q. Well just a matter of a few minutes then I take it?

A. Yes.

Q. And when you arrived at the plant, did you go down to the pier and take a look at the ship?

A. Yes, I did.

Q. Now who was there when you arrived?

A. Well Olivia Gonzales was there and Joe Garcia was there.

Q. Were they down on the dock by the barge?

A. Yes, sir.

Q. And what was the condition of the PETER B as you [fol. 178] observed her on your arrival Sunday morning, September 24th?

A. Well the water was over the top clear up to the last two valves in front of the engine room.

Q. By that do I take it you mean that the outshore end was submerged?

A. That's right.

Q. And that the after end or the inshore end with the pump room was afloat?

A. Yes, sir.

Q. And what did you do then?

A. We went back to the office and I had Olivia place calls again to Captain Wynne and Mr. Stovall. I thought they should both know it since they had assured me it was all right.

Q. Which of the two gentlemen did you reach first?

A. Mr. Stovall.

Q. And what conversation did you have with Mr. Stovall.

repeating as nearly as you can remember what he said to you and what you said to him?

A. I told him that the barge was sinking and that the water was up to the last two valves in front of the engine room and that we didn't know what to do with it because Joe was afraid to pump the molasses in our tank because it would have salt water in it. We didn't want to contaminate the rest of our molasses and I wanted him to know that since he had assured me that it was all right; that I was in a predicament.

Q. Yes. And what did he say?

A. Well I told him that we'd also placed calls for Captain Wynne; that I was unable to reach him at that time.

[fol. 179] Q. Did he have any comment to make about—"if your house is burning down, you don't wait for the insurance man, pump out the house"—I mean—excuse me; did he have any comment to make in substance that if your house is burning down you don't wait for the insurance man but you call the fire department to put your house out?

A. He did. He did.

Q. —to put your fire out?

A. He did.

Q. And what did you—what did you take that comment to mean?

A. Well I had told him I didn't know anything—what to do in a case like that when we didn't know—we were afraid to put the molasses in our tank. Well I didn't know what I was supposed to do.

Q. Did he suggest that you pump the molasses overboard?

A. No, he didn't.

Q. Was there any suggestion made by anybody that the molasses be pumped overboard?

A. Not at that time.

Q. Now, did you succeed in reaching Captain Wynne?

A. Yes, later in the afternoon; around 2 or 2:30.

Q. And what conversation did you have with Captain Wynne?

A. I told him what had happened thus far and he told me to start pumping the molasses overboard until he

could get there in order to keep it from completely sinking. So that's what we did.

Q. Did you tell Captain Wynne that the forward or outshore end of the barge was completely submerged?

A. Yes, sir, I did.

[fol. 180] Q. Did you do anything then about pumping out the barge?

A. Yes, we started pumping molasses overboard in order to keep it afloat.

Q. Did Captain Wynne say anything then about coming down to the plant?

A. Yes. He said he'd be down there just as soon as he could get there.

Q. Now did you hear again from Mr. Stovall after your talk with Captain Wynne?

A. Yes, sir, he called shortly after that and I told him—he wanted to know what we were doing and I told him that Captain Wynne had told us to pump it overboard. He asked me if I didn't know that there was a fifteen hundred dollar fine for doing that without a permit and I told him, no, I didn't and I told him you better let me go then, so I could go down there and have the boy shut the pumps off until I could get a permit.

Q. And did you have the pumps shut down?

A. Yes, sir, I did.

Q. And then what did you do?

A. Well there was a Coast Guard shack right just a little ways from where the barge was docked and I went there. There were several Coast Guard boys there but they said they couldn't give me the authority to do that but they called the chief and he wasn't in but they got hold of another man that had authority and they said that it was all right for me to go ahead and pump the molasses in the slip, so we did that, until Captain Wynne came.

[fol. 181] Q. And after you got authority to start the pumps again from the Coast Guard people, did you start the pumps again?

A. Yes, sir.

Q. Did you instruct Joe Garcia to do it?

A. Yes.

Q. And then Captain Wynne came down you said?

A. Yes, sir.

Q. About what time was it that Captain Wynne appeared?

A. It must have been about three.

Q. Had you made any attempt after you got down to the terminal to locate Mr. Frieler?

A. Yes, sir, we did. We knew that he was en route home. We tried in Corpus Christi. He had given me the hotel number there but he had already checked out when we made the call, so I knew there wasn't any way of getting hold of him until he arrived in Houston and left Mr. Dickerson, the man who had gone with him to McAllen, out at his home.

Q. Did you call Mrs. Dickerson's home?

A. Yes, sir.

Q. And leave any message?

A. I told her that when Mr. Frieler left Mr. Dickerson out, to try to catch him because we needed to get hold of him immediately.

Q. Did you hear from Mr. Frieler that afternoon?

A. Yes, sir, he called in between 3 and 3:30.

Q. And what did you advise Mr. Frieler?

A. I told him what had happened and the condition of the barge and what we were doing and Captain Wynne [fol. 182] was in the office at the time I talked to him and he told me to ask Mr. Frieler if Joe took a Baume test on it and if it tested so much that we could pump it in our tank but when Mr. Frieler talked to him he told him that he would be down there within thirty to forty-five minutes. Well, he told him that we would wait until he got there and then he could take the Baume test himself.

Q. What time did Mr. Frieler arrive at the terminal?

A. About 4 o'clock.

Q. Was Captain Wynne present when Mr. Frieler arrived?

A. Yes, sir.

Q. Do you know whether Captain Wynne and Mr. Frieler went down to the barge?

A. Yes, sir, they did.

Q. Did you go with them?

A. I don't remember. I was back and forth so many times.

Q. Now subsequently did Mr. Frieler ask you to make a report of what occurred during his absence in connection with the sinking of the barge?

A. Yes, sir, after he got there and they started work well he came back to the office and had us place a call to Mr. Kaplan in New York and it was sometime before the call came through and so while we were waiting for the call, I typed up my report of the events of the day.

Q. Do you recall what time the call came through? The call from Mr. Kaplan in New York.

A. Well it was late. If I remember right, 9 o'clock; around there.

[fol. 183] Q. Now after you typed up this report, did you read it over and sign it?

A. Yes, I did.

Q. And what did you do with it?

A. Well it was kept there in the office so far as I know.

Q. Mrs. White, will you look at this file which is marked "Libellant's C for identification" and state whether report number eleven is a copy of the report that you made at that time?

A. Yes, sir, it is.

Q. And you have compared it have you and you know that it is a correct copy?

A. Yes, sir.

Q. And the original of this report was signed?

A. Yes, sir.

Q. And it was made the same day, Sunday, September the 24th, 1944, as the barge sank?

A. That's right.

Mr. Varian: May it please the court, I'll re-offer this report as the recollection of the witness recorded as well as on the ground that it was a report made in the regular course of the business of the Southwestern and kept in the regular course of the business of Southwestern.

Mr. Lemle: I believe I'm going to object to it on the ground—she can use it to refresh her recollection, but it cannot be offered as a whole.

[fol. 184] The Court: Do you want to say anything on that?

Mr. Varian: I have—I have felt, sir, that if a report was made in the regular course by an employee of a company, that such—and such report was made the day of an incident reflected by the report, that on two grounds such report, subject of course to probative value, was admissible and in conjunction with the testimony of the witness I offer it.

The Court: I sustain the objection. She had testified to the contents of that report. She apparently did not even need it to refresh her recollection.

Mr. Varian: It was exactly on that——

The Court: She has been able to testify without the aid of it and I don't see that it adds anything to the case.

Mr. Varian: Perhaps it will not but it was exactly on that ground that she didn't use it to refresh her recollection that I re-offered it, sir.

By Mr. Varian:

Q. Mrs. White, after this—strike that please.

As I understand it, on Sunday, September 24th, you had two telephone conversations with Mr. Stovall; am I correct?

A. Yes, sir.

Q. One was the result of a telephone call that you put [fol. 185] in to him and the other one he put in to you?

A. That's right.

Q. Now during the course of the conversation that you had in either of these telephone calls, did you make any request upon Mr. Stovall that he attempt to get some pumps—some outside pumps or some outside equipment to assist in keeping the barge from further sinking?

A. No, sir, he suggested that; that I try to reach—get hold of the Nunez Construction Company.

Q. And did you?

A. Yes, sir. I got Mr. Sweeny that lived in Lamont and he told me that their rig was over at the causeway and that it would be a job to get it over there.

Q. Did you call any other companies in the area?

A. Yes. We called the Republic Marine and they couldn't do anything about it.

Q. Did you succeed in reaching any company that had equipment available?

A. No, sir.

Mr. Varian: I tender the witness, Mr. Lemle.

Cross examination.

By Mr. Lemle:

Q. Mrs. White, you testified in this case at Texas City, on—on July—on October the 11th, 1946; is that correct?

A. Well, I don't know the date. It was in 1946, yes.

Q. It was in 1946. Well that was ten years ago. Your memory then was better then than it is now, wasn't it?

[fol. 186] A. It would be as good.

Q. Well, if there is a discrepancy between what you've said today and what you said then, which would be correct?

A. Well it might have been phrased to me differently. I don't know what you're getting at.

Q. Well you testified this morning that it was 12 o'clock on Sunday when you were notified that the barge was sinking. You testified in your deposition that it was 9 o'clock on Sunday morning.

Mr. Varian: I don't think the lady testified to that effect, Your Honor. My recollection is that she testified that at nine o'clock in the morning she went at the plant and looked at the barge and was alarmed and called Mr. Stovall.

Mr. Lemle: That was on Saturday. I'm talking about Sunday.

Mr. Varian: I'm talking about Sunday too, Mr. Lemle.

Mr. Lemle: All right, my recollection of the testimony is, the lady said it was nine o'clock—that on Sunday it was 12 o'clock when Texas Terminal notified her that the barge was sinking. That is my recollection of the testimony. If I am incorrect, I stand corrected.

The Court: She said that the other girl in the office called her and told her that she had been informed by the watchman from the terminal.

[fol. 187] Mr. Lemle: At what time?

The Court: I don't remember the time. What time?

The Witness: Nine o'clock.

Mr. Lemle: Nine o'clock. All right.

By Mr. Lemle:

Q. And then it was 12 o'clock before you reached Mr. Stovall?

A. That's right.

Q. So between 9 o'clock and 12 o'clock, the barge just sat there and sank and nobody did anything?

A. Well, it didn't get much worse than it was. There still wasn't any water going in the engine room.

Q. Now on the day before, on Saturday, you say you left at noon and went home. When you went home at noon, did you see the barge then?

A. I went down and looked at it before I left, yes, sir.

Q. And what condition was it in at 12 o'clock noon on Saturday?

A. The same condition it was at 8 o'clock.

Q. Does the—or did your company have any marine employee such as a watchman whose duty it was to watch the barges, tend to their lines; slacking them and tieing them up, or notify anyone if they broke loose or anything like that?

A. No, sir, not that I know of.

Q. So that when you left at 12 noon, it was then your [fol. 187a] intention to leave this barge sit there until Monday morning when you returned to work?

A. That's right.

Q. If you had not been notified on Sunday the barge was in difficulty, you would have done just that?

A. Yes, sir.

Q. Now, when you talked to Mr. Wynne— By the way, you said you put in calls on Saturday for Mr. Wynne and for Mr. Stovall?

A. That's right.

Q. You got Mr. Stovall first?

A. Yes, sir.

Q. Was that accidentally?

A. No, we placed a call to Mr. Wynne first but just accidentally Stovall's came through first.

Q. Did Mr. Stovall tell you that that barge should be watched?

A. No, he did not.

Q. He didn't tell you anything about watching it?

A. No, sir, he did not.

Q. And he did not tell you that the barge should be unloaded immediately?

A. No, he didn't.

Q. Did he tell you anything about discussing it with Mr. Wynne and taking his advise? (sic)

A. No, he didn't except that he told me when Captain Wynne came down he was to look at it before it was unloaded and again afterwards.

Q. I'm speaking about Mr. Stovall; not about Mr. Frieler. [fol. 188] Did Mr. Stovall tell you anything about consulting with Mr. Wynne.

A. He told me just what I told you then; that when Captain Wynne came down he was to look at it before it was unloaded and afterwards.

Q. Mr. Stovall told you that?

A. He told me that, yes.

Q. Now, did Wynne make any suggestions to you on Saturday about watching that barge and taking care of it or unloading it?

A. No, he did not.

Q. You could have unloaded it had you had instructions to do so? You had the facilities to pump it out then and there on Saturday?

A. That's right.

Q. Now after you talked to Mr. Stovall; you say that call was a Sunday call to Mr. Stovall and came through about 12 o'clock?

A. Yes, sir, around there.

Q. And what time—what did Mr. Stovall tell you then? Did he tell you then to start pumping that barge?

A. No, I don't know that he did. He said that we should be doing something about it. He didn't say what I should do.

Q. And he did suggest to you that you get hold of an outfit with pumps?

A. Yes. He said to get hold of the Nunez Construction Company; somebody that could raise it.

[fol. 189] Q. Could you then have pumped it with your own pumps?

A. I don't think so.

Q. Well the water wasn't in the pump room, was it?

A. No, but the valves were all submerged but the last two.

Q. Well as a matter of fact, didn't Mr. Garcia dive down afterwards and open those valves?

A. Well, he did some diving. I remember that.

Q. Well if his testimony shows that he dove over and opened some valves, he could have done it just as easily then as he did later?

A. I guess so.

Q. Then what time did you get the call through to Mr. Wynne?

A. Sunday afternoon?

Q. Yes.

A. It was around 2:30.

Q. So that between 12 o'clock and noon when you talked to Mr. Stovall and 2:30 when you got over to Mr. Wynne, still no one did anything?

A. Well except that we were trying to reach Mr. Frieler or reach somebody that could do something about it. I had no experience with something like that. I didn't know what to do.

Q. And there was nobody else there that did have any experience and knew what to do?

A. No, sir.

Q. And you were the person in charge?

A. Yes, sir.

[fol. 190] Mr. Lemle: I think that's all. Thank you.

Redirect examination.

By Mr Varian:

Q. Mrs. White, when you talked to Mr. Stovall on Saturday, the 23rd, did you tell Mr. Stovall that there would be nobody there after noontime on Saturday?

A. Yes, sir, I told him that we got off work at 12 o'clock Saturday noon and that there wouldn't be anyone there until Monday.

Q. Did you tell Mr. Stovall that there was nobody down at the plant with experience that would know what to do—

strike it out please. Did Mr. Stovall know of your unfamiliarity with floating equipment?

A. Yes, he did.

Q. Did you tell him that you weren't familiar with it?

A. I told him that I didn't know anything about anything like that.

Q. On Saturday, the 23rd, when you talked to Captain Wynne, am I correct that you advised him that the starboard forward corner or the right hand forward corner was down and water was washing over it?

A. Yes, sir, I did.

Q. Did Captain Wynne seem at all alarmed about the condition?

A. No, he did not.

Q. If Captain Wynne had instructed you or recommended to you that the barge be pumped out at that time, could you have done it?

[fol. 191] A. Yes, sir.

Q. Would you have asked Joe Garcia to do it?

A. Yes, sir.

Q. You didn't feel then that Mr. Frieler's instructions not to pump the barge out until Captain Wynne saw it, covered a situation such as this situation that you found on Saturday morning? Is that a fair statement?

Mr. Lemle: It's a leading question.

Mr. Varian: It is quite leading.

The Court: It certainly is a statement all right.

Mr. Varian: It is quite leading. I'll withdraw it.

The Court: All right.

The Witness: Well, Captain——

Mr. Varian: I withdrew the question.

The Court: Just a minute.

By Mr. Varian:

Q. Have you seen the PETER B loaded on previous occasions?

A. Yes, sir.

Q. Had you ever seen her in the same condition as she was when you looked at her on Saturday morning?

[fol. 192] A. No, sir.

Q. Mrs. White, did anybody from River Terminals Corporation ever notify you at anytime of the date of the arrival of the barge at the slip?

A. No, sir.

Mr. Varian: That's all.

Mr. Lemle: One minute.

Recross examination.

By Mr. Lemle:

Q. Mrs. White, you had a night watchman there on Friday night? The night between Friday and Saturday, you had a watchman there to whom that barge was delivered, did you not?

A. That was there to the Texas City Terminal, not to any of our men.

Q. Who directed River Terminals where to tie the barge up?

A. I suppose Texas City Terminal did.

Q. That was not your employee?

A. No, sir.

Q. Who usually did it? When the barge arrived at night time, who directed the tugboat men what to do with it?

A. I don't know. I didn't have anything to do with that.

Mr. Lemle: That's all.

The Court: All right, watch your step coming down.

[fol. 193] The Witness: Thank you.

Mr. Varian: Thank you.

(The witness withdrew from the witness stand.)

Mr. Varian: At this time I would like to offer——

Mr. Lemle: Have you finished with the live witnesses before we start offering all the dead testimony?

Mr. Varian: Yes, sir.

Mr. Lemle: Your Honor, may we proceed out of order and complete the live witnesses?

The Court: If counsel has no objection.

Mr. Varian: I have no objection. You're talking about Mr. Grant?

Mr. Lemle: That's right.

Mr. Varian: None whatsoever.
The Court: Very well.

ARTHUR GRANT: a witness called by and on behalf of the Respondent, having been duly sworn, was examined and testified as follows:

[fol. 194] Direct examination.

Mr. Lemle: Will you admit Mr. Grant's qualifications?
Mr. Varian: Yes, sir.

By Mr. Lemle:

Q. Mr. Grant, in your capacity as marine surveyor and engineer, did you see—ever see Barge ABL 109 after it was renamed the PETER B in the period say 1942-1943?
A. Yes.
Q. For whose account?
A. Well, Joe Tierney and I think he represented Southwestern Molasses.
Q. Engaged you to do what?
A. First to look at the barge and give him an appraisal so that he could buy it.

The Court: Who was that, did you say?
The Witness: Joe Tierney.
The Court: Who is he with?
The Witness: He was with Southwestern Molasses. He was their Port Engineer or consultant of some kind.
The Court: I see.
[fol. 195] The Witness: And then I made a sketch so that he could convert it to carry molasses.

By Mr. Lemle:

Q. Did you make and furnish a sketch to convert the barge to a molasses carrier?
A. Yes, sir.

Mr. Varian: Did you say "molasses carrier"?
Mr. Lemle: That's right.

By Mr. Lemle:

Q. Have you a copy of that sketch in your file?

A. Yes, sir.

Q. Will you produce it?

(The witness produced a document)

Q. Now before going into that, Mr. Grant, tell us, at that time, what the situation was with regard to the availability of men and material?

A. Well it was during the war and men and material and barges and steel generally were very scarce and because of that they substituted, instead of centerline bulkhead, three old tank car tanks and then took the hopper sides—this was a hopper type barge—it had an inner skin—they took the plate—that plate—the inner skin to make the bulkheads and the decking.

Q. Now as I understand it she was a hopper type barge ABL-109.

[fol. 196] A. That's right.

Q. Do you know whether she was a riveted or welded barge?

A. She was a riveted barge.

Q. Do you know or approximately when she was built?

A. I think 1922 or it might have been '26; either of them.

Q. And what were these three cylindrical tanks that were put down the center of her?

A. They were tanks cars taken off the base. The tanks of tank cars. They were about—oh, say 10 feet—9 to 10 feet in diameter, 20 feet long each.

Q. And what was done—pardon?

A. Twenty or thirty feet long; something like that.

Q. That produced a barge with how many cargo carrying compartments?

A. Well there was those three tanks and then it was subdivided into four other tanks I think. I'm not quite so sure.

Q. You subsequently made another drawing for a conversion of the barge to an oil carrier. Have you looked at that? Would that assist you in seeing how many tanks there were?

A. It might.

The Court: Well that first sketch you made did not contemplate the use of these tank cars, did it?

The Witness: Yes, it was in there too.

The Court: It did.

[fol. 197] The Witness: Excuse me. We first—they wanted to do it without these tanks but they couldn't find steel enough and in their efforts to find steel they found these tank cars and they substituted that for it.

There are four cargo tanks other than—four cargo tanks other than the tank car tanks.

By Mr. Lemle:

Q. And where did they get the steel to make the bulkheads and decks?

A. They took that from the hopper sides and the old house that was on the barge originally.

Q. That was all second-hand material?

A. Oh yes.

Q. Approximately 20 years old?

A. Right.

Q. Now, did you make a recommendation—any recommendation at the time you made your original conversion plan for—for stanchions or props or other weight bearing device to support the deck?

A. Yes, sir, I did.

Q. Does that show in that plan?

A. Yes, sir.

Q. Do you know whether that was complied with?

A. Not according to this plan. They substituted something else for that. Something not quite as good.

Mr. Varian: May I have the last answer. I didn't hear it.

[fol. 198] The Witness: Not according to that plan. They substituted something for that.

By Mr. Lemle:

Q. You say "they" substituted?

A. They substituted something.

Q. So at that time— What is the date of that first plan?

A. November 29th, '42.

Q. And that converted it to a— It was converted to a molasses carrier?

A. That's right. Yes, sir.

Q. And was that work done under your supervision or was—did you see it later?

A. No, sir, it was not done under my supervision. The next time I saw it they had completed the job as a molasses tanker. Then they had sort of the idea of getting it passed to carry oil.

Q. Did you make a plan to convert it to an oil carrier?

A. Yes, sir, I did.

Q. Is this the plan which is in evidence as——

Mr. Lemle: Where did you mark it?

Mr. Varian: It's on the other side.

By Mr. Lemle:

Q. —"Libellant-1" which is marked in the lower left hand corner "Grant Exhibit 1". It is a plan dated January 25th, 1943?

[fol. 199] A. That's right.

Q. And it says "conversion of Barge ABL-109 to D&E Oil Carrier."

A. That's right.

Q. And what did you do with that plan?

A. Sent it to the Coast Guard with an application for a license to carry oil.

Q. Will you tell us what happened to the application?

A. It was turned down. It said that the barge lacked sufficient scantling. That it would need many alterations before they could accept it.

Q. Were those alterations made?

A. No, sir, not that I knew of. No, it never got permission to carry oil.

Q. And of course a molasses barge doesn't need any certificate from the Coast Guard?

A. The Coast Guard has no jurisdiction over molasses barges.

Q. Is there any difference in the strength required of a barge to carry molasses and a barge to carry oil?

A. It's practically the same.

Mr. Lemle: In connection with the witness' testimony, I re-offer the exhibit "Grant-1" and I also offer the small sketch of the original conversion and ask that it be marked "Grant-2".

The Court: You say that they made four tanks other than the three railroad tank cars? I understood earlier there were eight tanks.

[fol. 200] The Witness: There is a centerline bulkhead and four on each side of the centerline bulkhead. I think that's it. Then they have eight. They neglected the three cylindrical ones in the middle.

Mr. Varian: What was the last statement, Mr. Grant?

The Witness: If they said eight, they must have neglected the three middle ones in the center; the three cylindrical ones.

The Court: You mean there were eleven tanks?

The Witness: That's correct, as I understand it.

Mr. Varian: There were eleven tanks. That's the testimony.

Mr. Lemle: That's right.

By Mr. Lemle:

Q. In other words, there were four tanks but you say they were separated by——

A. A centerline bulkhead.

Q. —a centerline bulkhead. All right. Now, Mr. Grant, did you on one or two occasions or more occasions certificate this barge to carry molasses from New Orleans to Texas City?

A. Yes, sir.

Q. At the time that you certificated her, did you make any surveys of her interior bulkheads or piping or valves as to tightness?

[fol. 201] A. No, sir. Most of these surveys they would have—one time they would call me down because the towboat man objected to the depth of the loading and I was called down to pass on the freeboard and see if it was safe to go. Another time they had a slight collision and they had a small hole in the bow and I passed on that;

told them to put some cement box under it and let it go. I think that happened on two occasions. But usually the barge would be loaded and about ready to go when somebody would have some objection and they'd call me up and I'd go down and give it a quick look and tell them it was good or bad and go on.

Q. Would you certificate a barge for the carriage of cargo from Reserve down the Mississippi River, through the Intracoastal Canal and out into Galveston Bay and across to Texas City with wasted plates—plate or plates so bad they had pin holes in it and water was leaking in?

A. Of course not.

Q. Mr. Grant, will you tell us what is a chipping hammer?

A. Well a chipping hammer is a hammer used to knock scale or rust off steel. It is customarily a hammer with a face, you might say, with a chisel point about one inch wide with a chisel point on it and it weighs about a pound or a pound and a half.

Q. Pointed or chisel edged?

A. Chisel edged.

Q. Could you break a sound plate or cut a sound plate with one of those hammers?

[fol. 202] A. No, sir.

Q. Isn't it a customary method of repairing dented plates in ships and barges to fair them in place, that is, similar to hammer them out in place after they're bent?

A. It is quite customary to pull the dents out in place.

Mr. Lemle: I tender the witness.

Cross examination.

By Mr. Varian:

Q. Mr. Grant, have you ever heard of the use of a chipping hammer to fair a plate?

A. No, sir.

Q. Have you ever heard of the use of a chipping hammer on the internals of a tank ship where the skin of the ship forms the bottom or sides of a tank?

A. Certainly. You use a chipping hammer on all parts of a tank.

Q. Excuse me. What happens, Mr. Grant, if you use a chipping hammer on the internals of a tank which forms the skin of a ship and you hit it four or five times? What happens?

A. You knock the rust off it.

Q. And you'll also go through it, won't you?

A. No, sir, not unless it is paper thin. I have used an eight pound maul with all the strength I could command and I couldn't put a hole in a plate that was an eighth of an inch thick.

Q. Mr. Grant, in your experience have you ever been warned not to use a chipping hammer in the bottom of tanks?

[fol. 203] A. Never in my life and I've been in the business fifty years.

Q. But in any case, you don't tear out a plate using a chipping hammer, do you?

A. No, sir.

Q. That is rather bad practice to try that, isn't it?

A. Well it would have been ridiculous and nonsensical. Nobody with any common sense would try to do it.

Q. Yes, sir. Of course. Now Mr. Grant, you testified that you saw the PETER B in 1943 for Southwestern. Am I correct?

A. Yes, sir.

Q. How do you know it was Southwestern that you—that asked you to look at her?

A. Well, let me put it this way. It's twelve years ago. I've had ten thousand jobs since then, you see, and I'm telling you what I can recollect, you see, but as I remember it, someone from the Southwestern Molasses called up and said that they were complaining about the boat—somebody wouldn't take it; would I please go down and look at it and let them know if it was fit to go or recommend whatever was necessary for it to go and I did.

Q. And your testimony in answer to Mr. Lemle's questions was based on this same sort of recollection?

A. Yes, sir.

Q. And it could have been some other company that asked you down rather than Southwestern, couldn't it?

A. It could have been the towboat company; that the towboat captain might have been objection (sic) to taking it.

[fol. 204] Q. Or it could have been ABL——

A. No, not ABL.

Q. Or Pacific Molasses Company?

A. Well I wouldn't say so, no.

Q. Your recollection isn't quite clear on who it was?

A. As far as I know it was the Southwestern Molasses.

Q. Have you examined her and blue printed her for what purpose?

A. First I made a blue print—sketch for them to make a molasses barge and then they conceived the bright idea that it could take molasses one way and oil the other and they'd make some money and they asked me to make a sketch and see if they could get a permit for them to carry oil.

Q. Well the first one was molasses, was it not?

A. Yes, sir.

Q. Now, am I correct—did you testify that you don't have to be certificated to carry molasses?

A. I did. At that time you didn't but maybe there's some law I don't know anything about.

Q. Well you keep pretty well up on what the Coast Guard requirements are, don't you, Mr. Grant?

A. Fairly do.

Q. Well is it required now?

A. I don't think so.

Q. Well back in 1943 which I'll concede is thirteen years ago, was it not necessary to have an oil—to have a molasses barge certificated if she was engaged in offshore work?

A. Offshore work is something else again but this was an [fol. 205] inland thing.

Q. Well, how did you know this was an inspection for inland carriage? Who told you?

A. Well, Mr. Tierney told me. He was— It was his scheme and I was helping him with his boss to get the steam so he could carry the molasses from here to Texas City in the Intracoastal Canal, and I remember distinctly stating that this was for inland waters only.

Q. Well I thought you testified that the reason for this inspection, this first inspection, was to attempt to get the barge certificated to carry molasses. Now am I right or wrong?

A. No, no, no. No certificate whatever is necessary——

Q. I'm wrong about that?

A. —just to carry molasses, that's all.

Q. Am I wrong about that; that no certificate is necessary? Am I wrong about it?

A. As far as I know you're wrong.

Q. But for the carriage of oil, I think we're all agreed you need a Coast Guard certification?

A. That's true.

Q. Now you mentioned that the PETER B was a riveted barge?

A. Yes, sir.

Q. Do you remember when you saw the PETER B last, prior to its sinking?

A. About—I—probably a couple months before. I'm not sure though. Six months before. Something like that.

Q. Would it surprise you to know Captain, that the PETER B is partially a welded steel barge and partially [fol. 206] a riveted steel barge?

A. Well the partially welded is what they did now to convert it. That would be the welded part but she was originally constructed as a riveted barge.

Q. Originally she was constructed as a riveted barge but subsequently there was a considerable amount of welding done?

A. Only the welding put on to try to make her——

The Court: Is that the hull part; the skin?

The Witness: No, same old hull. Just took these plates and put them on there and welded them up.

By Mr. Varian:

Q. Was there any new plating?

A. I don't think there was any new plating put into it. It was either part of that barge or second-hand plating they got somewhere else. Steel was not available at the time.

Q. Well, when I say "new plating", I don't mean that it came right fresh out of Bethlehem Steel, Mr. Grant; I mean was it new in the sense that they got it somewhere and put it on the ship?

A. It would be new from a junkyard if that would help you.

Q. Well that's what they were doing in 1944, wasn't it?

A. That's right, yes.

Q. You heard of cannibalizing, haven't you, Captain? Haven't you, Captain?

The Court: When you say "new", to the court that [fol. 207] would mean that it was being used for that purpose for the first time, counsel. We understand the situation now.

Mr. Varian: Thank you.

By Mr. Varian:

Q. And you mentioned that there was some plating that was twenty years old, second-hand plating that was put on the barge when you viewed it after this inspection that you made, didn't you?

A. Yes, sir.

Q. And it could have been twenty years old or it could have been three years old, couldn't it, Mr. Grant?

A. If they had bought it but the stuff that I'm talking about was the part of the original barge that they used. That was all twenty years old. They took the plating from the inside of the hopper. That was twenty years old, and they used that. They could have bought plate from a junkyard that was one year old for all I knew, but it was old. They bought no new plating that I knew of.

Q. Well you have old plating that is perfectly sound, don't you, Captain?

A. Absolutely.

Q. And there is no reason to suspect that the plating that they used although old or second-hand as you mentioned was not in sound condition?

A. Not at all.

Q. I'm sorry.

[fol. 208] A. Not at all.

Q. And then you testified that in 1940—strike it out please.

Now subsequently, I think you testified that she was certificated for molasses carriage?

A. No, there was no certificate necessary. The only certificate would be that I would go down and write a report to say that in my opinion she was seaworthy for the voyage. That would be the only certificate she would have.

Q. That is what you had in mind when you said "certificated"?

A. Yes.

Q. And ships carry molasses and can take water and sink because they have holes in their plates whether it is due to waste or what have you as well as ships carrying oil, can't they, captain?

A. Yes.

Q. And it isn't your habit to certificate a ship as being fit and seaworthy to carry molasses if she has any holes in her, is it?

A. No, sir.

Q. And if you issued a certificate in June of 1944 that the barge PETER B was fit and seaworthy to carry molasses you issued that certificate after you made an inspection of the barge, didn't you, captain?

A. In June of '44?

Q. Yes, sir. I say "if"——

A. "If".

Q. —you did it.

A. (Nodded affirmative.)

[fol. 209] Q. If you did.

A. If I issued the certificate to say that she was fit to carry molasses, I had looked at her and found that she was fit to carry molasses.

Q. And you were satisfied as part of your inspection that she didn't have any excessively wasted plates and pin holes or leaks in her, weren't you, captain?

A. If I had seen any holes or leaks, I wouldn't have pased (sic) her.

Q. And you would not have issued such a certificate without looking at her, would you?

A. No, sir, or having someone else look at it.

Q. Now Captain, before you issued these certificates, just what kind of an examination would you expect to be made of a ship before you said she was fit and seaworthy to carry molasses?

A. Well in my case, everytime I was called down the barge was usually loaded or half loaded or something and it would be in connection with a small indent or a hole or something like that and I could not see the inside of the barge nor would I see much of the outside of the barge but I could see the place that they were asking for; for instance, the headlog or the rake or something like that or I could tell whether she was loaded deep enough or not, but I never made an internal examination of the barge at any time because there was always molasses in the barge.

Q. So I take it then, Captain, what your testimony is, is that you issued such a certificate without looking [fol. 210] at the skin of the barge if she was loaded; (sic) all I could see would be the deck, you see, and the rakes.

Q. And whether you could see it or not, you nevertheless issued the certificate, isn't that true?

A. That's true.

Q. Do you think that's good marine practice?

A. I think it is excellent practice and I make a wonderful living at it.

Q. Yes, sir, I concede that you do because I have employed you on numerous occasions, Mr. Grant. Now Captain, you have a pretty fair idea as to the physical construction of the PETER B?

A. Yes, sir.

Q. Your recollection has been refreshed by Mr. Lemle prior to the time you testified here today?

A. No, he couldn't very well refresh my recollection.

Q. Did you talk to Mr. Lemle before you testified?

A. I talked to Mac Grace, Ed Grace, Percy Flannagan, Mr. Lemle—well, any other body around town— Those are my daily contacts and we discuss these things daily.

Q. Well you don't discuss the PETER B daily, do you, Mr. Grant?

A. With these men that were interested in it.

Q. Well now, Mr. Grant, if, in June of 1944, which is just a few months prior to the time she sank in September, 1944——

A. Yes, sir.

Q. —if you had examined the PETER B and if, at the time you examined the vessel, you found the following [fol. 211] conditions so far as cargo was concerned, namely: Bow Rake Tank—3″ water, the Port Number One Tank—Dry, Starboard Number One Tank—Dry, Cylindrical Center Tank—1″ molasses, Port Number Two Tank—Dry, Starboard Number Two Tank—Dry, Port Number Three—Dry, Cylindrical Center Tank—Dry, Port Number Four—1″ molasses, Starboard Number Four—1″ molasses, and the Cylindrical Center Tank—Dry; you'd say then there was at least one occasion on which you examined the barge and found numerous of the tanks dry, wouldn't you?

A. Yes.

Q. Now, if, after you made such an inspection you issued a report, "It is my opinion that the barge is in fit condition to carry cargo of molasses from New Orleans to Texas City, via Intracoastal Canal", would you or would you not say that you inspected the tanks internally?

A. Well, we sounded them. I didn't go in them.

Q. You feel that you could form an opinion as to the fitness of that barge without an internal inspection of the tanks?

A. Yes, sir. I sounded the tanks, of course. If they're not leaking, I assume they're tight.

Q. If they aren't leaking it's all right?

A. Yes, sir.

Q. You think that's a sufficient inspection?

A. That was for that job.

Q. Well now with the——

A. Well, let me put it to you this way. I use the tools I have to work with. The only tools I have at my command [fol. 212] on a job of that kind— Nobody can go in a molasses barge that is empty. They would be asphyxiated. Do you understand that? All you can do is sound it.

Q. Yes, I understand, Mr. Grant, that if you go——

A. And I have been doing this job for fifty years, you see, more or less, and I use the tools that—on every job I have a different condition to meet and I use the tools that are given to me and with the best of my ability. Then I pass—if I think it is satisfactory, I say it's all right and

I sign it and it goes. If I don't think it's right, I tell the man no.

Q. Is one of your tools a mask that will permit you to go down there and look?

A. No, sir. Not unless there is a man down there I have to take out.

Q. How long does a molasses tanker have to be free of cargo before she is safe?

A. It is hard to tell. It depends on the weather and all the rest of the things. I've lost good men in molasses tanks. I don't tank (sic) any chances on them.

Q. How about four hours?

A. Well, I wouldn't say— No, not four hours. No, sir. I've lost men in them after ten hours, after twelve hours.

Q. Depends on the size of the tanks?

A. It depends on everything; the weather, the molasses, the fermentation and all the rest of those sort of things.

Q. Well now with the tanks port and starboard and the three center tanks dry would you say that the barge, at [fol. 213] least the forward part of it, was light—riding light?

A. It would be riding on an even keel under those conditions, practically.

Q. Well it would be riding light, wouldn't it, Mr. Grant?

A. Yes, light with an even keel; the forward part would not be any lighter than the rest of it.

Q. You mean to say if you had no cargo in the forward compartments and you did have cargo in the after compartments the forward compartments—the forward part wouldn't be higher than the after part?

A. That is right, it wouldn't be.

Q. Your pumping equipment on this barge is aft, isn't it?

A. Yes, but it is not very heavy and it doesn't give it very much of a trim.

Q. So the forward part of the barge is light?

A. It is light.

Q. If the after tanks are empty, the whole barge is light?

A. Right.

Q. What is the draft of the barge light, without any cargo? Do you know?

A. No. I'm guessing at 18 inches.

Q. 18 inches exposed most of the sides of the barges?

A. Right.

Q. Well now, Mr. Grant, all you would have to do with the barge in such a condition is to take a look and with your experience of fifty years, am I not correct that by taking a look you can tell whether there is excessive waste or not?

A. Not altogether. Wasteage happens in places that are [fol. 214] very often hard to see but with my experience I can give a casual glance at a barge and fairly well tell its condition and whether it is fit to go or not.

Q. You can tell pretty well whether it is all right to go?

A. Yes.

Q. Maybe there is a chance that she isn't all right to go?

A. There may be times when there would be something wrong that we won't be able to see and she won't make it.

Q. And you nevertheless will issue such a certificate?

A. That's right.

Q. Now this certificate, and I'm going to ask you to take a look at it, was issued on whose behalf, sir?

A. River Terminals Corporation.

Q. Is that your signature?

A. Yes, sir.

Q. Did you personally make that inspection or did somebody else in your office?

A. Well I assume I did it but I'm not sure. I don't think anybody else did it.

Q. Well you issue many——

A. I think if I had anyone else make it there would be a name in the right-hand corner. There is no name there.

Q. I see. But you do issue many certificates under your signature where the inspection is made by somebody else?

A. Made by an assistant, that's true.

Q. Now Mr. Grant, would you take a look at this certificate, photostat certificate, dated October 31st, 1944, apparently after the barge was raised and state whether it [fol. 215] was issued by you?

A. Yes, sir, it was.

Q. And that's your signature?

A. That is.

Q. Did you inspect the barge yourself?
A. I did.
Q. Do you recall going to Houston to do it?
A. No, I never went to Houston.
Q. Well then you didn't make it, did you?
A. I never went to Houstoh. (sic) Gretna Machine Works.
Q. I'm sorry. I was mistaken about that. But your recollection is that you made that inspection yourself?
A. Yes, sir. Yes, sir.
Q. Now in this——

Mr. Varian: I'm going to ask that these two certificates be marked for identification so that we can make reference to them. I would ask that the report or certificate dated June 9, 1944, be marked "Libellant's Exhibit 18" for identification—or I will offer it in evidence I believe since it has been sufficiently identified. I will offer it in evidence as "Libellant's Exhibit 18".

The Court: "19".

Mr. Varian: "19".

I didn't show them to him but do you want to see them?

[fol. 216] Mr. Lemle: No.

Mr. Varian: Now I'll ask that the certificate or report dated October 31st, 1944, be admitted as "Libellant's Exhibit 20".

By Mr. Varian:

Q. Now Mr. Grant, referring to your report dated October 31st, 1944, "Libellant's Exhibit 20", do you have a copy of it before you?
A. No sir, I have not.
Q. I'll quote from it. "The deck generally is sagged down about 10" each side midway between vessel's side and centerline."

Now at the time you viewed that vessel in June of 1944, was that condition present?
A. What is the date of this last time?
Q. October 31st, 1944, after it was sunk and raised.
A. No, sir. If it was, it wasn't as noticeable as after she was raised.

Q. Well if there was any noticeable sagging in the deck structure, am I correct that a surveyor of your caliber would note it on the report?

A. The deck structure of that vessel was like the waves of the ocean at all times. It was made of a very light plating and it was wavey all the time, see, but it was much more wavey after she was raised.

Q. It was wavey all the time but much more wavey after she sunk and was raised?

[fol. 217] A. Right.

Q. Now you state further in your report of October 31st, '44, "The tanks were all sounded and found dry. The pump room is more or less dry, but extremely dirty and filled with fumes of fermented molasses."

A. Yes, sir.

Q. You didn't go down in the tanks yourself on that occasion?

A. No sir, I didn't.

Q. Did you find that condition when you examined the barge in June, 1944?

A. I don't remember.

Q. If you had found such a condition—if it had been present, would you have noted it in your report of June of 1944?

A. Very likely would have.

Q. May we assume that it wasn't present then?

A. You may.

The Court: Could we assume that it is not in the report?

Mr. Varian: That the condition was not present then.

The Court: No, I said about the report. I haven't seen it. There is nothing in the first report about that?

Mr. Varian: I'm awfully sorry, sir. I haven't shown it to you either.

The Court: I don't know whether the witness has seen it either, since he made it.

[fol. 218] Mr. Varian: I was going to first just offer them for identification and then I forget I put them into evidence.

Mr. Lemle: Of course, if Your Honor will permit me, the second one is after the raising, October the 31st, after the raising.

The Court: Yes, I understand.

By Mr. Varian:

Q. Would you like to review them, sir?

A. I'd like to see them. I think it would be a good idea.

A. This one is made as a result of an accident—collision somewhere.

Q. I appreciate that.

Mr. Lemle: Which one?

Mr. Varian: The one of June——

The Witness: The one of June 9th, 1944, where it had a collison (sic) on May 27. "On May 27, 1944, "PETER B" was tied up to the bank of Mile Post 355 awaiting Tug "SEA RANGER", when Tug "MAUD WILMOT" towing a number of Dredge Pontoons belonging to the Hill Dredging Company, rammed "PETER B" on starboard stern rake with one of the pontoons, knocking a hole in same." And as a result of that, I sounded the tanks naturally to see if she was leaking in the cargo tanks and that's why you got these soundings.

[fol. 219] By Mr. Varian:

Q. Do I take it that you didn't sound any of the other tanks?

A. I sounded the entire barge to make sure she wasn't leaking and after sounding and finding out she was tight, I stated it was my opinion the vessel was in fit condition to carry a cargo of molasses. That is the customary and usual procedure.

Q. Is it usual and customary for you to refer to certain tanks on a vessel and not all the tanks when you sound it?

A. Any that I sound.

Q. So would you say it is fair—it is a fair conclusion that since you named certain of them as having been sounded, that you did not sound the rest of them?

A. Not at all. Not at all. I could have sounded them and made a note of them.

Q. Could have sounded them all?

A. Or looked into them with my eyes. For instance if the rake manhole cover is open I could see in there. I wouldn't sound that.

Q. Do you know of any particular reason why you

sounded tanks one to four inclusive and then didn't sound four to eight?

A. Well I sounded them all. That was one to—you mean the port and starboard side.

Q. Well do you know of any reason why you didn't sound all of them?

A. No, I don't. Let's see what it says. She was struck in the starboard side, you see.

[fol. 220] Q. Yes. Forward or aft?

A. That would be the reason for it. It was struck in the rake with one pontoon.

Q. Where was she struck, forward or aft?

A. "—rammed "PETER B" on starboard stern rake—"

Q. And yet you sounded the forward tanks?

A. Yes, sir. All of them.

Q. From one to four and you didn't sound the after tanks?

A. I don't know whether I did or not. I didn't make a note of it anyway.

Q. No.

A. Well I sounded what I thought was necessary, and I was the judge.

Mr. Varian: I have no further questions.

Redirect examination.

By Mr. Lemle:

Q. Tell me, Mr. Grant, is there anyway for a surveyor to tell what the internal cargo bulkheads or bulkheads in cargo tanks are tight or whether the valves in the lines are tight or the lines themselves are tight without having hydrostatic tests on them?

A. No, the way you do, you just test one tank at a time and go in the other one and look at the valve on that bulkhead and then you fill the next one and go through that. Of course you can go down and look and if there are holes in them you can see that but the customary test is filling them with water—the adjoining tanks with water.

[fol. 221] Q. Well now some question has been raised as to the party for whom you made these—first the conversion drawing to convert her from a hopper to a molasses

tanker and secondly, the—whose account you made the application to the Coast Guard accompanied by this sketch to convert—to secure a certificate to carry petroleum. Do you have any idea th. it was anybody other than Southwestern Sugar and Molasses Company?

A. It was always— It was always an employee of the Southwestern Sugar and Molasses. It was someone connected with them; Captain Preston or Joe Tierney or one of them.

Q. Would you get paid——

A. I always got paid. I hope I did.

Q. Who paid you?

A. Southwestern Molasses I imagine paid me. The girl in the office gets that. I don't get that.

Mr. Lemle: That's all. Thank you.

Mr. Varian: I only have two questions to ask.

Recross examination.

By Mr. Varian:

Q. Mr. Grant, do you know that Captain Preston was in 1944 and he still is employed by the Commercial Molasses Corporation?

A. Yes.

Q. Not Southwestern.

A. Those Commercial—well, there was a tie-in of some kind.

[fol. 222] Q. That is your assumption; that there is a tie-in with all molasses companies?

A. Well, the Kaplan gang.

Q. I'm sorry.

A. The Kaplan gang. They were all tied in together.

Q. The Kaplan gang?

A. Gang, yes.

Q. GANG?

A. That's right.

Q. Mr. Grant, if the vessel's cargo lines were leaking, if the manhole covers on the cargo tanks had bad gaskets, corroded bolts and were leaky, if her side plates had such excessive scale that when it was scaled off, pin holes were

evidenced, if she had ripples in her deck and if her deck was not firm enough to withstand somebody walking across the deck, would you say she was fit and seaworthy to carry a cargo of molasses?

A. Not if I saw her——

Q. —on the Intracoastal Waterway?

A. Not if I saw it.

Q. Not if you saw it?

A. No sir, I would not.

Q. Is it reasonable to assume that you would look for such things before you would issue a certificate that she was fit?

A. Usually.

Mr. Varian: Thank you, sir.

[fol. 223] Mr. Lemle: Thank you, sir.

(The witness withdrew from the witness stand.)

Mr. Lemle: May Mr. Grant be excused?

Mr. Varian: Yes, sir.

The Court: That's the only live witness you have?

Mr. Lemle: Yes, sir.

OFFERS IN EVIDENCE BY LIBELLANT

The Court: Now we will go back to your case then.

Mr. Varian: Sir?

The Court: I say, do you want to proceed with your case?

Mr. Varian: Yes indeed.

Now Your Honor, the depositions which I am about to offer and Mr. Lemle will later offer will make reference to two tugs; one called the DOTTIE D and the other called the SAMBO. I think at this time we might read into the record the pertinent physical characteristics of those two tugs which I have taken from the Gray Book issued by the Department of Commerce.

The DOTTIE D is an oil screw, 68.9 feet long by 20.1 feet in breadth by 8 foot, 4 inches in depth, built in 1942, [fol. 224] gross tons 94, net tons 41, horsepower 800, owned by River Terminals Corporation.

The tug SAMBO is an oil screw, 69.2 feet in length by 20 foot breadth by 9 feet 1½ inches in depth; 94 gross tons, 41 net tons, 400 horsepower, built in 1942, similarly owned by River Terminals Corporation.

Now I would like to offer in evidence the deposition of Joe E. Garcia, taken at Texas City, October 11th, 1946. I don't believe there are any exhibits offered in connection with it. Included, however, within the same binder are depositions of L. H. Frieler and Mrs. Warda White. I'll ask Mr. Lemle whether he prefer that it be separated.

Mr. Lemle: There isn't enough difference in the deposition and the testimony today. It doesn't make any difference.

Mr. Varian: It doesn't make any difference.

Mr. Lemle: To me. Suit yourself.

Mr. Varian: Thank you, Mr. Lemle.

The Court: You're simply going to offer Garcia's?

Mr. Varian: Garcia's. This is "Libellant's Exhibit——

The Court: Libellant 21".

[fol. 225] Mr. Varian: I'll offer the deposition of Leroy C. Post, P-O-S-T, taken on November 14, 1947, as Libellant's Exhibit 22".

(Mr. Lemle and Mr. Varian consulted.)

Mr. Varian: Mr. Lemle and I will offer jointly the various survey reports. That is reports of survey made after the vessel was raised.

Mr. Lemle: That's Gleave survey, the Wynne survey, the Lambdin survey——

The Court: Gleave that is?

Mr. Lemle: Gleave, G-L-E-A-V-E.

The Court: What was that third one; Lambdin?

Mr. Lemle: L-A-M-B-D-I-N.

If Your Honor please, they're all attached to a memorandum of stipulation dated May 16th, 1951. There is a survey report dated Houston, Texas, October 26th, 1944 by Bencal, B-E-N-C-A-L and Lambdin. That was by Lambdin. The second one is a survey report, dated, Houston, Texas, October 13th, 1944, by R. L. Wynne, W-Y-N-N-E. The third one is a survey report, dated, Houston, Texas,

October 10th, 1944, by Captain A. A. Colbury, C-O-L-B-U-R-Y. I don't remember that one.

[fol. 226] The Court: How does he spell it?

Mr. Lemle: C-O-L-B-U-R-Y.

The next one Survey Report dated, Galveston, Texas, October 13th, 1944, signed by James, G-L-E-A-V-E. The next is a survey report dated, New Orleans, Louisiana, July 9th, 1944, signed by A. A. Grant. That's the one we just referred to. Is that already in?

Mr. Varian: I believe so.

Mr. Lemle: Survey report dated October 31st, 1944, signed by A. A. Grant. That's all—that's already in. Those last two are already in in connection with Mr. Grant's testimony.

The Court: One of those surveys then was made prior to this accident in June?

Mr. Lemle: Yes, sir, one was made in June and one was subsequently made. They're all attached to the——

The Court: What is the date of that stipulation which they are attached to?

Mr. Ponder: It was filed May 2nd, 1955. It is already in the record.

[fol. 227] Mr. Lemle: Dated May 16th, 1951.

The Court: Yes.

Mr. Ponder: It is not necessary that all of this has been introduced into the record. There was quite a bit offered on the various interrogatories and admissions and so forth.

The Court: You're going to offer the interrogatories and the answers and the admissions?

Mr. Varian: I didn't know whether to offer filed documents. Normally, you don't do that and I thought perhaps rather than try to do that, we could make reference to it in our briefs.

Mr. Lemle: If you don't offer them and there is an appeal, they're not going to go up. They won't go up. You had better offer them.

Mr. Varian: Well then, suppose we offer them.

Mr. Lemle: All right, offer it.

The Court: You might make a——

Mr. Ponder: Yes, we'd like the entire record, including the interrogatories and the cross interrogatories and the

[fol. 228] requests for admissions of genuineness of documents, including within it the bill of lading and other documents that were requested to be admitted.

Mr. Lemle: I now join in that offer.

The Court: All-right.

Mr. Lemle: It is quite a slew of documents here.

The Court: Yes, I know. I wanted to ask about the objections which might have been made during the taking of these depositions.

Mr. Lemle: Reserved.

The Court: Are there any serious objections raised?

Mr. Ponder: I read them over. Of course I had nothing to do with it, I read them over and I saw no serious matters raised.

The Court: I take it you're not going to read these depositions; you're simply going to let——

Mr. Varina: (sic) Well, whatever Your Honor would like. Of course there are parts of Mr. Lemle's depositions tht (sic) I think were unfavorable to the Libellant's case but since he is going to offer the depositions, Your Honor is going to ponder over it, I see no point in taking the court's [fol. 229] time. unless the court would like to hear them.

The Court: It would only be necessary I think if there were some questions objected to and you might want to have them passed upon.

Mr. Ponder: Did you see anything in there that's——

Mr. Lemle: There are the usual run of the mill objections. I don't think that some of them are well taken, frankly, on both sides, but there is nothing startling.

The Court: In other words, you'll just leave it to the court to——

Mr. Lemle: Yes, I'm willing to submit mine——

The Court: —decide the objections.

Mr. Lemle: I'm willing to submit my objections without argument.

Mr. Ponder: I think we are too, Your Honor. I don't think they amount to much, the objections, to change the picture of the case one way or the other.

The Court: All right.

Mr. Lemle: Are you finished?

[fol. 230] Mr. Ponder: Yes.

Mr. Varian: Well then, Libellant rests.

OFFERS IN EVIDENCE, BY RESPONDENT

Mr. Lemle: On behalf of the respondent, in addition to the interrogatories, the request for admissions, the admissions and the documents that have been jointly offered, I offer in evidence the depositions of R. L. Wynne, with exhibits therein referred to; Wynne Exhibit-1, which is a duplicate of the survey report already put in; Wynne Exhibit 2, which is a letter dated January 6th, 1948 to Messrs. John D., M. A. and Edwin H. Grace, from Mr. Wynne; and Exhibit Wynne 3, which is a letter from Southwestern Sugar and Molasses Company, dated September 21st, 1944, from Mr. Wynne, which I think is a duplication of the exhibit already in evidence but it is easier to put it in than to check it.

I also offer in evidence the testimony—the deposition of H. B. Lambdin, L-A-M-B-D-I-N, and the exhibits which were offered in connection therewith which is, "Lambdin-1", a sketch, "Grant-1", a drawing, to which Mr. Lambdin referred and "Lambdin-2" which is his survey report and already in evidence.

I also re-offer in evidence the photographs which were attached to the request for admissions and which have been since—which were withdrawn on order of court for the purpose of being testified from by Mr. Lambdin and which he has put certain pen markings and they are [fol. 231] numbered "RTC-5, 6, 7, 8 9 and 10 respectively. I think 5 and 9 have already been put in evidence by the other side.

The Court: Do you have five photographs there?

Mr. Lemle: I beg your pardon?

The Court: Do you have five there?

Mr. Lemle: Yes, I have three more here and two—I beg your pardon, there are six; 5, 6, 7, 8, 9 and 10. There are six of them; four of them the clerk—two of them the clerk already has and I now hand the other four to him.

I also offer in evidence the deposition of J. M. Stovall, S-T-O-V-A-L-L. The document marked "Grant-1" which I previously referred to and offered in evidence appears actually to be marked "Lambdin-1". I also offer the notice to take these depositions.

The Court: This document you have marked "Lambdin-1", that was attached to the Stovall deposition?

Mr. Lemle: No, sir, it is attached to the Lambdin deposition.

The Court: Have you offered the Lambdin?

Mr. Lemle: It may be additional. It is marked "Lambdin-1". I offer it in evidence. I don't know whether it is [fol. 232] a duplication or not. I'm not going to stop to check.

The Court: You offered Lambdin's deposition also?

Mr. Lemle: Yes, sir, I offered the Lambdin deposition.

The Court: You already have it marked?

The Clerk: "Grant-1" was a blue print.

Mr. Lemle: Correct. In addition to that I offer "Lambdin-1" which is a skestch (sic) made by Lambdin.

The Clerk: That's attached to Mr. Lambdin——

Mr. Lemle: —the deposition. That's correct.

I offer in evidence, the deposition of Alphonse Allemand A-L-L-E-M-A-N-D, who was the captain of the tug SAMBO. At the time that Captain Allemand's deposition was taken, the call was made by Mr. Grace for the production of the log book, original log book, of the SAMBO. That was on June the 14th, 1952, to which I replied I didn't have it, didn't know whether or not I could produce it at that late date but I would investigate it. I subsequently investigated and found that this original log book had been left aboard the SAMBO and had been destroyed when that vessel sank. I then wrote Mr. Grace a letter on the date of June 17th, 1952. I offer a copy of that letter and ask that it be marked "Respondent-3," in which I [fol. 233] asked him, in effect, if he would require witnesses or whether he would agree to my statement as to the investigation. I offer that letter in evidence marked—his reply—as "Respondent-4". The sum and substance of it was that he would agree to stipulating that the named witnesses of Coyle would testify in accordance with my investigation.

I conducted an investigation and this vessel had been sunk and in that connection I secured a copy of the report of survey from which it appears that on January 1, 1945—I beg your pardon it wasn't sunk. It was the DOTTIE D,

not the SAMBO, had been run over by her barges and completely sunk and showing the nature of the damage which was mud coating in the Pilot House, Captain's Quarters, which precludes any possibility that the log book could have survived in a legible condition.

The Court: When did she sink?

Mr. Lemle: On January 1st, 1945.

Mr. Varian: I would raise any question as to that. I won't make any comment as to that, Mr. Lemle.

Mr. Lemle: All right. Do you want to put it in?

The Court: "Respondent-3 and 4"; these letters were in connection with that sinking, were they not?

[fol. 234] Mr. Lemle: Yes, sir.

Mr. Varian: I won't comment on it.

Mr. Lemle: All right.

I offer in evidence, the deposition of Mr. Hinkle, John S. Hinkle.

In connection with the prior deposition of Alphonse Allemand, I offer in evidence a statement attached thereto marked "Allemand-1", which is cross examined and which purports to be a typewritten copy of the log produced from my files.

I offer in evidence a copy of the letter dated October 11th, 1944, to the War Department from River Terminals Corporation by Mr. N. R. Merriam, Chief Accountant, to which is attached the report for the month of September, 1944, official report which undertakes to show the barges and tugboats, complete tows, which passed through the Canal in the month of September. On page 5 of this report shows the SAMBO with four barges, including the PETER B, gives their load, then their quantity of the load in tons, their point of origin and their destination.

I may say at this point that there is a discrepancy between it and the certified copy of the Government report which was produced here this morning, in that this report shows that the SAMBO had in tow four barges while the Government report shows three barges. I am betting on the correctness of the——

[fol. 235] The Court: You marked that "Respondent-5"?

Mr. Lemle: I marked that "Respondent-5"; the letter and its report, particularly page five.

That completes it, if Your Honor please.

There were stipulations—if there were stipulations entered into by both sides during the taking of the depositions, I offer—and whatever they are, I offer them blanket.

Mr. Ponder: I just wanted to check to see if this stipulation was in there.

Mr. Lemle: No, I never did agree to that.

Mr. Ponder: You wouldn't?

Mr. Lemle: No.

Mr. Varian: What is that? Let me see.

(Mr. Varian and Mr. Ponder consulted.)

Mr. Varian: I think, Your Honor, our——

Mr. Ponder: It was merely a stipulation. I thought this was—I wasn't sure that Mr. Lemle knew this was never signed.

Mr. Lemle: I am willing to agree to it now, but it was never signed.

[fol. 236] Mr. Ponder: That was merely one of the skippers—— Well, we agree not to draw any inference by its not being produced. This is the statement he gave.

Mr. Lemle: I was unable to locate a witness and Mr. Grace asked if I would agree to certain testimony and I told him I would if he would agree that this statement was the statement made by that witness. He said no and I said no and that's where it stands. I'm (sic) said I'm still willing to make the swap otherwise.

The Court: This statement is at variance with——

Mr. Lemle: No, we never found it.

Mr. Varian: It is a statement and I think it would be very well to put it in for the enlightenment of the court.

Mr. Lemle: I have a signed copy if you want it.

Mr. Ponder: Yes, can we put that in?

The Court: Are you going to file those now?

Mr. Ponder: I'd like to file them.

The Court: These are not in the record are they?

[fol. 237] Mr. Ponder: No, sir. He has a signed copy.

Mr. Lemle: If Your Honor please, we'll offer that unsigned copy in evidence. I'll find the signed copy and hand it to Mr. O'Brien.

Mr. Varian: Let's take it out and agree that this is all right.

Mr. Ponder: I'd like at this time to mark it "I-23" and offer and file it in evidence.

The Court: What is it?

Mr. Ponder: It is a statement by John Theriot and he was the pilot of the tug DOTTIE D, which exchanged tows then with the tug SAMBO.

The Court: What was his name?

Mr. Ponder: Theriot, John Theriot, T-H-E-R-I-O-T.

The Court: How did you number that exhibit; "23"?

Mr. Ponder: "L-23".

Mr. Lemle: Do you want that stipulation signed?

[fol. 238] The Court: Weren't you looking for something in exchange for that?

Mr. Lemle: Yes, sir, I was looking for a signed copy of Mr. Theriot's statement but there is such a mass of papers there it may take me thirty minutes to find it.

The Court: I say in consideration of your stipulating this, weren't you——

Mr. Lemle: They asked me to stipulate this which I am willing to do, if they so want to do it.

Mr. Ponder: Well, insofar as the gallons, may it please the court, this is the number of gallons of molasses that were pumped and so forth. If it is decided on the question of liability, there is liability, then we will go on.

The Court: Oh, I see. Don't you think it would be well to make that—let that——

Mr. Lemle: When you get around to it I'll sign it then or I'll sign it now.

Mr. Ponder: I think we can agree on that.

The Court: All right.

[fol. 239] Mr. Varian: With that I would say both sides rest.

COLLOQUY BETWEEN COURT AND COUNSEL

The Court: Very well.

What about arguments, gentlemen? Do you wish to file written briefs? Is that your idea?

Mr. Ponder: Well that was our idea.

The Court: I think that was the intention.

Mr. Varian: Yes, sir.

The Court: Are you agreeable with that, Mr. Lemle?

Mr. Lemle: I'm sorry, Your Honor——

The Court: We will have written briefs in this matter?

Mr. Lemle: Yes, sir, that would be my idea.

Mr. Varian: Your convenience, subject to the approval of the court.

Mr. Lemle: Well it is customary for Libellant to file a brief first, however if Your Honor thinks we ought to exchange them—I think the Libellant should file a brief and I should see the Libellant's position before I'd reply to it.

The Court: I would think so.

[fol. 240] Any objection to that?

Mr. Varian: No, we have no objection to that, sir. We can file a brief within a limited time and then Mr. Lemle will reply——

The Court: And then you'll have a chance to answer.

Mr. Varian: A chance to answer it.

Mr. Lemle: I'll reply within ten days or two weeks of the time I get your brief.

Mr. Varian: May we have two weeks?

The Court: All right.

Mr. Ponder: That will be fine.

The Court: And you'll have ten days after that to answer them. Ten days or two weeks?

Mr. Lemle: Well, I'm thinking I'm running into quite a sizeable case before Judge Wright on the 4th and this will hit me just about the time I'm engaged in that brief in that other case and that's why I'm just a little bit hesitant about committing myself to filing the answer within ten days, because on the fourth we're going to start——

[fol. 241] The Court: Make it two weeks.

Mr. Lemle: I think two weeks will be all right.

The Court: All right, you will have two weeks and then respondent will have two weeks and then you'll have a chance to reply.

Mr. Varian: Say ten days after that to reply?

The Court: If you do not wish to reply, you will just let me know.

Mr. Ponder: So notify the court?

The Court: Yes.

Mr. Varian: I would like to thank the court for the privilege of coming before it.

The Court: It is a pleasure to have you here.

Mr. Varian: I've been before Judge Wright in New York but never before Your Honor.

The Court: He is going back in August of this year. Stand at recess.

(The court recessed at 4:02 P.M., May 15, 1956.)

[fol. 242] Reporter's Certificate (omitted in printing).

Deposition of Joe E. Garcia

Joe E. Garcia: was called as a witness on behalf of the libelant and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Grace:

Q. What is your name?

A. Joe Garcia.

Q. Where do you reside?

A. San Antonio.

Q. What is your present occupation?

A. Contractor.

Q. What kind of work?

A. Building contractor.

[fol. 243] Q. Have you ever been employed by the Southwestern Sugar and Molasses Company?

A. Yes, sir.

Q. About how long altogether have you worked for the Southwestern Sugar and Molasses Company?

A. About five years.

Q. What were the duties you performed in your service with Southwestern Sugar and Molasses Company?

A. Warehouseman, and loading and unloading tank cars and the barges.

Q. Did you ever have occasion to unload the barge "Peter B"?

A. Yes, sir.

Q. In loading the tank cars how did you load them, how is that handled?

A. By steam pump from molasses tank to tank car.

Q. Is that loading or unloading done with the same arrangement?

A. Yes, sir.

Q. We are investigating here the sinking of the barge "Peter B". at your plant here in September, September 24, 1944. Were you working for the Southwestern Sugar and Molasses Company at that time?

A. Yes, sir.

Q. In the same capacity you described?

A. Yes, sir.

Q. In your connection with the company did you have occasion to do any repairs or painging (sic) on their vessels?

[fol. 244] A. Yes, sir.

Q. Did you have occasion to do any work on the barge "Peter B. prior to September 24, 1944?

A. Yes, sir.

Q. What did you do; what was done?

A. Well, we were scrubbing and painting.

Q. You mean scrubbing and painting the "Peter B."?

A. Yes, sir.

Q. How did you go about scrubbing and painting her?

A. We used chipping hammers and chipped all the rust, and used a wire brush, and then applied two coats of paint.

Q. I will ask you, after this accident did you see the barge "Peter B." when she was raised and put in dry dock?

A. I know I saw her after she was raised, yes, sir. I did not see her in dry dock.

Q. You did not see her in dry dock?

A. No, sir.

Q. This painting and scraping extended from how far on the barge? What did you paint on the barge?

A. We painted everything complete except about a foot that was in the water.

Q. In other words, you painted the sides of the barge?

A. Sides and everything, yes, sir.

Q. And was she light or loaded at the time you painted her?

A. Unloaded, light.

Q. Were you present and did you take part in that patinging (sic) and scraping?

A. Yes, sir. I supervised the job.

[fol. 245] Q. Did you find or was there any defective plating reported to you while that work was going on?

A. Not to my opinion. I did not find any.

Q. Did you have occasion before the sinking of the barge, immediately before, a few days before, to notice the condition of her decks as to whether they were level or not?

A. Yes, sir. They were. I would say at first they were even.

Q. When you say "at first" you are referring to the time before or after the sinking?

A. After. After it was sunk and it was brought to the surface the hull had given away or something like that; I don't know.

Q. How did it look after being level or smooth?

A. There were places that were high and the seams were low.

Q. What was the first knowledge you had that the barge "Peter B." was in trouble in September when she arrived here from New Orleans at the time we are talking about when she sank? When did you first see her after she arrived here?

A. In the morning when I came to work I noticed that the barge was pretty low, close to the water surface.

Q. What did you notice with respect to whether or not any water was getting on the deck or was on the deck?

A. The water was going over the bow of the barge two or three feet. The wind was strong and the waves would roll over, right on the right-hand side corner, I would say. I wouldn't know what you would call that.

Q. How far would the waves extend on that deck?

[fol. 246] A. About two or three feet.

Q. Was anything done with respect to the barge at that time with respect to pumping the cargo out?

A. No, sir. I came and notified the office of the condition of the barge.

Q. In any event, you do not know why pumping was not started?

A. No, sir.

Q. Of your own knowledge?

A. No, sir, not of my own knowledge, no, sir.

Q. If you had received orders from the office to pump the barge out were you in position to do so?

A. Yes, sir.

Q. You were thoroughly familiar with the operation necessary to pump her out?

A. Yes, sir.

Q. Was anything done that day with respect to pumping the barge?

A. No, sir.

Q. When did you next see the barge "Peter B."?

A. The next day, I should say around 11:00.

Q. And what did you find her condition to be at that time?

A. Well, she was sunk. The bow was sunk to the bottom of the slip.

Q. How about the stern?

A. The stern was afloat.

Q. Do you know if anything was done that day with respect to making efforts to raise the barge or to keep the stern from sinking?

[fol. 247] A. Yes, sir.

Q. Can you just tell us generally what was done?

A. We connected a 10-inch flexible hose that we kept on the docks for discharging boats or barges and started pumping into the shore tank.

Q. And how long did you continue pumping into the shore tank?

A. I do not exactly remember, but for a little while, and there was a lot of water mixed with molasses, salt water.

Q. Have you had sufficient experience to determine when water is mixed with molasses?

A. Yes.

Q. And you determined that in this instance?

A. Yes, sir.

Q. Then did you stop pumping?

A. Yes, sir.

Q. Then what was done after that, and who else was present with you at that time?

A. Well, I don't know his name. That has been a long time. I don't remember whether I would remember his face.

Q. Did he seem to be a man familiar with the operation of boats?

A. Yes, sir.

Q. Was he making suggestions?

A. Yes, sir, suggestions trying to unload six and seven tanks so that we could get the stern afloat.

Q. And did you make efforts to do that?

A. Yes, sir.

[fol. 248] Q. Were you able to pump anything out from six and seven tanks?

A. Yes, sir.

Q. Well, were you able by means of pumping to raise the forward part of the vessel from the bottom?

A. No, sir.

Q. Were any suggestions made by anyone present to do certain things that might help in raising it that were not done that you know of?

A. Not that I know of, sir.

Q. What did you do personally with respect to assisting in the raising of the barge, or efforts to raise?

A. Keeping the motor and the pump going.

Q. Anything else that you did personally?

A. Not that same day, but later on. We did everything we could. I opened the valves so we could force air into the tanks to lift her.

Q. Those valves you opened, were any of them under water?

A. Yes, sir.

Q. How did you open them?

A. I had to dive in there and make two or three turns at a time, and come back to the surface for air, and dive again.

Q. You did not have a diving outfit?

A. No, sir.

Q. You opened these valves that were required to be opened?

A. Yes, sir.

Q. Do you know if the operations to raise the barge by means of pumping were successful?

[fol. 249] A. No, sir.

Q. They were not?

A. No, sir.

Q. Aside from pumping, do you know of any other method that was used in attempting to raise her?

A. No, sir.

Q. Were you present when they were using air?

A. Yes, sir.

Q. You saw them pumping air into the tanks?

A. Yes, sir.

Q. You have seen the barge "Peter B.", have you not on other occasions come in?

A. Yes, sir.

Q. Loaded?

A. Yes, sir.

Q. About what freeboard forward did she usually have when she came in loaded?

A. I would say about 3 feet; 2½ to 3 feet.

Q. Is that forward or aft?

A. You mean by forward——

Q. The head end, away from the pump house.

A. The aft would be lower than the forward.

Q. You were giving us what, forward or aft?

A. I would say about 2½ feet on the back and about 3 feet forward.

Q. During your experience have you ever seen the barge "Peter B." come in and be in the water as she was forward on this occasion?

[fol. 250] A. No, sir.

Q. With respect to pumping out the rake space forward on the barge, can that be done by use of your pumps on the barge itself?

A. No, sir.

Q. How do you go about that, if that is necessary; how would it have to be done?

A. The manhole would have to be opened and use an individual pump.

Q. Have you in your experience with the company ever had occasion to pump out the dry cargo space?

A. No, sir.

Q. After this sinking and the vessel was raised state whether or not you had occasion to pump out the rake space forward?

A. After it was raised?

Q. Yes, after the barge was raised did you have occasion to pump out the rake space?

A. Yes, sir.

Q. Did you find much or little water in the rake?

A. We found quite a bit of water.

Q. How did you pump it out, by what means?

A. We used our hand pump.

Mr. Grace: I believe that is all.

Cross examination.

By Mr. Lemle:

Q. Mr. Garcia, what day of the week was it when you first saw the barge, do you recall? I am talking about when she came in.

[fol. 251] A. On Saturday morning.

Q. About what time?

A. Between 7:00 and 8:00. I came to work at 7:00, you see.

Q. Who did you tell that the barge was in the condition you say found it in?

A. Miss Wertenberger.

Q. When did you next see the barge?

A. Sunday.

Q. You didn't see it from Saturday until Sunday morning?

A. Yes, sir. I see it too at 12:00.

Q. From the time you first saw it, which you say was 7:00 or 8:00 on Saturday morning, did you see it again until Sunday?

A. I saw it when I went home, before I went home at 12:00, but I didn't see it close by. I walked across by the Seatrain dock, across from the slip, and I didn't see it until Sunday, around 11:00 that day, in fact.

Q. And you went home then?

A. I went home, yes, sir.

Q. And you did not come back between 12:00 Saturday and 11:00 Sunday; you never came back?

A. No, sir.

Q. You stayed at home?

A. Yes, sir.

Q. When you did this painting on the barge that you are talking about, how long before the sinking was that?

A. Well I don't know exactly, but it was about, I don't know, maybe a couple of months, something like that.

[fol. 252] Q. And the barge was afloat then?

A. Yes, sir.

Q. How much of the barge was under water; what was her draft when you did the painting, do you recall?

A. Well, I couldn't exactly tell you, but it was not very much because it has got a seam six inches in places and we could see that. I couldn't exactly tell you how much water it drew, you know, but we painted pretty close to the bottom.

Mr. Lemle: I think that is all.

Redirect examination.

By Mr. Grace:

Q. The barge "Peter B." when she docks she does not dock right in front of your plant?

A. No, sir.

Q. You cannot see her from here?

A. No, sir.

Q. She is tied up where, in what water-way?

A. On the slip, on the right-hand side, which would be the south side of the slip.

Q. Where?

A. Warehouse A.

Q. Warehouse A side?

A. Yes, sir.

Q. Looking toward the channel, it would be on the right-hand side or left-hand side?

A. Right-hand.

[fol. 253] Q. Do you know if there was a Coast Guard station opposite where the "Peter B." was docked on this occasion?

A. Yes. Yes, they had a Coast Guard shack right at the entrance of the warehouse.

Q. How far is that away from where the "Peter B." was docked?

A. Around 100 feet.

Q. On the same side of the slip, or opposite side?

A. On the same side.

Q. Did they have at that time Coast Guard boats coming in and out of the slip?

A. Yes, sir.

Mr. Grace: That is all.

Recross examination.

By Mr. Lemle:

Q. You saw the barge on Saturday morning. You did not go on board her, did you?

A. Yes, sir.

Q. You did go on board?

A. Yes, sir.

Q. For what purpose?

A. Seeing that the barge was low, I checked all the manholes to be tightly secure.

Q. Were they all tightly secure?

A. Yes, sir.

Q. How many manholes are there?

A. Eight. I think there are eight. It is eight.

Q. You say they were all tightly secure?

[fol. 254] A. Yes, sir.

Q. Did they have gaskets in them?

A. I could not swear to that because I checked just the nuts and bolts.

Mr. Lemle: That is all, thank you.

Mr. Grace: That is all.

The State of Texas
County of Harris

I, Hali Etter, Shorthand Reporter and a Notary Public in and for Harris County, Texas, Special Commissioner,

hereby certify that the facts stated in the caption to the foregoing deposition are true; that at the time and place named Joe E. Garcia, The witness, personally appeared before me and, after having been first duly sworn, was examined by the proctors appearing for the respective parties hereto; that his testimony was taken down by me in shorthand, reduced to typewriting under my direction, and that the foregoing deposition constitutes a true and correct transcript of the testimony of said witness at said time.

Given under my hand and seal of office this twenty-sixth day of October, 1946.

s/ Hall Etter, Notary Public, Harris County, Texas, Special Commissioner.

[fol. 255] TESTIMONY OF LEROY C. POST

Testimony of Leroy C. Post, taken pursuant to notice at the offices of M. A. Grace, Attorney at Law, 901 Baronne Building, New Orleans, Louisiana, beginning at 2:40 o'clock P.M., on Friday, November 14, 1947.

Appearances:

For the Libellant:

M. A. Grace, Esq. 901 Baronne Building, New Orleans, Louisiana.

For the Respondent:

Lemle, Moreno & Lemle, Hibernia Bank Building, New Orleans, Louisiana, Selim B. Lemle, Advocate.

Stipulation

It is stipulated and agreed that the testimony of the witness is taken by consent at the offices of Mr. M. A. Grace, 901 Baronne Building, New Orleans, Louisiana, at 2:40 o'clock P.M., on the 14th day of November, 1947; that the testimony of the witness may be taken down by the reporter and by her transcribed, the formalities of signing and sealing being waived, counsel for the Respondent reserving the

right to make objections at the trial; copy of the deposition to be furnished to opposing counsel, the stenographic fees and cost of copy to be a taxable disbursement.

LEROY C. POST, witness on behalf of the Libellant, was called and, by consent of counsel, was duly sworn by Robert Indest, Notary Public in and for the Parish of Orleans, [fol. 256] State of Louisiana, and testified as follows on:

Direct examination.

By Mr. Grace:

Q. Captain, where do you reside?

A. 1404 Sumner Street, New Orleans.

Q. What is your present occupation?

A. Master mariner.

Q. How long have you followed a seafaring life?

A. Let's see—nineteen hundred and seventeen—when I first went to sea, 1908.

Q. And are you actively engaged in handling tugs and ships and so forth?

A. Yes, sir, I am.

Q. What license, if any, do you hold from the United States Government?

A. Master of ocean going vessels of any gross tons, first-class pilot Mississippi River, Intracoastal waters, Houston, Texas; Atchafalaya River, Mobile, Pensacola and Key West.

Q. And for what companies have you worked?

A. W. G. Coyle Company.

Q. About how long did you work for W. G. Coyle Company?

A. About eleven or twelve years.

Q. What was the nature of the work you did with Coyle?

A. Towing, handling of barges and ships for Coyle.

Q. What waters were you engaged in?

A. Intracoastal Waterways, Mississippi River and also on the cost (sic).

Q. What other companies have you worked for?

[fol. 257] A. Bisso Towboat Company.

Q. How long did you work for Bisso?

A. Seven years.

Q. Was was the nature of the work you did with Bisso Towboat Company?

A. Handling ships, barges and colliers along the coast and also the Mississippi River.

Q. Can you name some other companies you worked for?

A. Them's about the only towboat companies; G & H Towboat Company of Galveston, Texas.

Q. And during that time you were engaged in the same kind of towing and handling barges?

A. Yes, sir, same way.

Q. Captain, we are investigating here damages sustained as a result of the sinking of the Barge PETER B at Texas City, Texas on September 23, 1944. The barge left Reserve, Louisiana on September 17 at 6:00 A.M. and at that time she had a small leak in her No. 2 tank; that she had a freeboard forward of three feet and aft of two feet six inches; that she arrived at Texas City on September 23, 1944 at about 5:00 A.M. I ask you to assume that at the time the head of this barge, which at the time of starting the voyage had a freboard (sic) forward of three feet; was down in the water so that the waves in the ship rolled up on the head of the barge, and I ask you to assume as a fact that the tug that towed the barge, that the Master of the tug that towed this same barge from Port Arthur to Texas City stated that it was in that same condition—that is, the head down as we have described—when he towed up from Port [fol. 258] Arthur, Texas; I ask you from your experience to state whether or not you consider it safe and proper to tow a barge that distance and through those waters in that condition?

A. Well, if I was captain of a tugboat that was towing a barge which had three foot freeboard which she left on the bow and made three foot forward and she was even with the water, I'd sound her and find out why she was in that condition and then I'd pump her out and if I found her rakes were dry I would tow her to that distance. If she still had water in those rakes, I wouldn't tow her.

Q. What would you do with her?

A. Stand by and keep the pump on her until somebody took that cargo or find a means of fixing that leak in her, if she was in my charge.

Q. Are Diesel tugs equipped with proper pumping facilities to take care of situations of that kind?

Mr. Lemle: I object to that question unless the specific name of a tug is given. The equipment of each tug differs.

Q. Do you consider it, Captain, from your experience, a necessary part of a Diesel tug engaged in towing that she be equipped with proper pumps to pump out, if the necessity arises?

A. Yes, sir, positively.

Q. And what has been your experience as to whether or not Diesel tugs are so equipped?

[fol. 259] A. All the tugs I have been on, for the companies I have worked for—Diesel tugs—all equipped with pumps sufficient to take care of the water; also a pump in the engine room to take care of the water. I refer to W. G. Coyle and Company as one.

Q. Taking, for instance, on a barge from here to Harvey to Texas City, should it become necessary, in your opinion, to beach a tow, are there any places between those two places where you could beach them?

A. If the vessel was leaking and in a condition where I couldn't control the water, I would. There are several places. I wouldn't attempt—wouldn't cause a hazard to navigation by letting the barge sink. I'd find a place where I could beach her along the banks for safety.

Q. Can you tell us where some such places are between here and Texas City?

A. Between here and Texas City, well, there are over five hundred different places to beach but from Port Bolivar—at Port Bolivar you could go into the Municipal Slip and put her in there and then there is a place at Port Bolivar on the outside of the old ferry landing, you could go inside there, or the railroad ferry transfer; have the flats of Texas City and in different various bayous that are not navigable.

Q. If you were in charge of a tow of barges and one of the barges you had in tow was a barge that during the voyage continued to go down in its freeboard, until it got to the water's edge, when would you first make efforts to inspect the condition of the tug?

[fol. 260] A. Mr. Grace, I would sound my barge morning

and evening and we would take at all times—assume at all times that the water in the rake of a barge had to be pumped out and investigate where the leak is and try to make some means to stop that leak.

Q. Have you been on barges that have been leaking and you adopted means of stopping the leak while out?

A. I'd build boxes, mud boxes, also cement boxes in barges that leak, also put new rivets in barges that leak.

Mr. Grace: That's all.

Cross examination.

By Mr. Lemle:

Q. If you sounded the rakes of the barge fore and aft and found the rakes perfectly dry and the rakes continued to be dry, you'd be satisfied with the condition of the barge, so far as the buoyancy is concerned?

A. That's correct, sir. As long as her rakes were dry, she couldn't sink.

Redirect examination.

By Mr. Grace:

Q. Taking an oil barge that has rakes spaced forward and aft, and in a loaded condition and with the rakes dry, three foot freeboard, what have you to say with respect to whether it could go down to the water's level without there being water in the rakes?

Mr. Lemle: I object to that question on the ground that [fol. 261] not sufficient information is given as to the type of barge to answer it.

A. I'd say that the barge—only way she's sink is with the rakes full of water.

Q. And in this instance the stern of the barge remained afloat and had rake space at the stern, what would you assume to be the condition of the rakes with respect to the water, assuming that the stern, even after the bow of the barge sank, the stern remained afloat above the barge and

had a rake space aft, what would you assume the condition of the rake space?

A. Would be dry—that's the oil barge, dry.

Q. One more question. If you arrived at Texas City at five o'clock in the morning, and there was nobody representing the company there at that time, state whether or not you would have left the barge in this condition with the head down and water rolling on the deck forward?

A. No, sir, I wouldn't have left her there at all, not until she was safe and turned into the hands of the people I was working for and if they assumed the responsibility, I, as Master, I would then take and release the barge but not before. I'd stand by that barge to keep her pumped out.

Thereupon, at 3:00 o'clock P.M., the taking of the deposition was concluded.

Certificate of Stenographer

I, Margie Witt, certify that the above and foregoing is a true and correct transcript of the testimony of Leroy C. Post, taken down in shorthand (Stenotype) by me and reduced to typewriting by me, said testimony being taken by [fol. 262] agreement under date of November 14, 1947, at 2:40 o'clock P.M., at the offices of Mr. M. A. Grace, Attorney at Law, 901 Baronne Building, New Orleans, Louisiana, the only parties present being the witness, Messrs. Selim B. Lemle and M. A. Grace, Attorneys, and myself; by consent of counsel, the witness being sworn by Robert Indest, Notary Public in and for the Parish of Orleans, State of Louisiana, to be used in the matter of "Southwestern Sugar & Molasses Company vs. River Terminals Corporation, Inc." No. 979 in Admiralty, now pending in the United States District Court for the Eastern District of Louisiana, New Orleans Division.

s/ Margie Witt, Reporter.

Deposition of Witnesses for Respondent

Depositions of witnesses taken on behalf of the respondent, on the thirtieth day of May, 1951, beginning at 10

a.m., at the office of Messrs. Fulbright, Crooker, Freeman and Bates, Second National Bank Building, Houston, Texas, before Hall Etter, Court Reporter U. S. District Court, Southern District of Texas, and a Notary Public in and for Harris County, Texas; signing, sealing and certification being waived; and all objections, except as to form, being reserved untll (sic) the trial; stenographic and notary fees for an original and two carbon copies to be a taxable disbursement.

Appearances:

For the Libellant:

[fol. 263] Messrs. John D., M. A. and Edwin H. Grace, by Edwin H. Grace, Esq.

For the Respondent:

Messrs. Lemle and Kelleher, by Selim B. Lemle, Esq.

R. L. Wynne was called as a witness in behalf of the respondent, and having been first duly sworn, testified as follows:

Direct examination.

By Mr. Lemle:

Q. Give your full name, age, residence and occupation.
A. Robert Lowry Wynne, 4369 North McGregor, Houston. Ship and cargo surveyor.
Q. Captain Wynne, you are a resident of Houston?
A. Yes, sir.
Q. You do not propose to be in New Orleans for the trial of this case?
A. Not so far as I know.
Q. You are here under subpoena?
A. Yes, sir.
Q. And the subpoena required you to produce your records on the survey of the barge "Peter B." Have you brought your records?
A. That is not what the subpoena recites. The subpoena

requires me to bring with me a copy of survey report dated October 13, 1944, covering the barge "Peter B."; and (2) any supplemental survey reports covering said barge, "Peter B.", as well as all correspondence between R. L. [fol. 264] Wynne, Southwestern Sugar and Molasses Company, and/or International Transportation Company, and/or A. I. Kaplan, and/or A. H. Frieler, relative to the said barge "Peter B."

The only record that I have in my file concerning this request is the report of survey dated October 13, 1944.

Q. Captain Wynne, did you attend the barge "Peter B." following her sinking at Texas City on the twenty-fourth of September, 1944?

A. Yes, sir.

Q. Who did you represent, Captain Wynne?

A. Messrs. Appleton and Cox, Incorporated.

Q. What was their connection with the barge, if you know?

A. I think they were underwriters.

Q. Do you know whether or not they were cargo underwriters on this barge?

A. I don't know. I am under the impression that they were.

Mr. Lemle: Mr. Grace, will you admit the Captain's qualifications?

Mr. Grace: Yes.

Mr. Lemle: Qualifications as surveyor?

Mr. Grace: I admit he is a qualified marine surveyor.

Q. Captain Wynne, do you have any independent recollection of this matter?

A. Only vaguely.

Q. Do you recall any of the incidents prior to the sinking [fol. 265] of this barge, and particularly any conversations that you may have had with Mr. Frieler or with his secretary, Mrs. White who as (sic) that time was unmarried and her maiden name was Warda Weirtenberger?

A. No, sir, I don't recall.

Q. Captain Wynne, in response to proceedings filed in Court and interrogatories addressed to the Libellant in this case, the Southwestern Sugar and Molasses Company has produced and filed in Court a letter which purports to be

from you to the Southwestern Sugar and Molasses Company, dated September 21, 1944. I show you a copy of that letter and ask you if you have any recollection of having written that letter and if it refreshes your memory in any way.

A. No, sir, I do not recollect writing the letter and it does not refresh my memory in any way.

Q. Do you recall the condition in which the barge "Peter B." was found by you to have been following the raising of the barge as to tightness of the deck above the hatches and around about them, and other places?

A. Only generally. My memory is not too good in connection with it. However, I think upon studying my report of survey that I will be in better position to answer your question. My memory is vague on most of the points. However, after studying my report of survey, I am quite sure it will bring back to me in general the condition of the barge.

Q. What have you to say as to the condition of the side plating of the barge? Have you any recollection of that other than contained in your survey report?

[fol. 266] A. No, sir.

Q. Did you express any opinion, any professional opinion, as to the cause of the sinking of this barge?

A. I couldn't offhand, not without study of this report. It may be contained in the report: I don't know. I haven't had time to read it.

Q. But aside from the report, you do not have any independent recollection which enables you to testify, independently of the report?

A. That is so.

Q. And this report, I assume, was written on the date shown at the heading, October 13, 1944?

A. That would be right, yes, sir.

Q. Do you have a copy of the report?

A. Yes, sir.

Mr. Lemle: In connection with the witness's testimony, I offer that report in evidence and ask that it be marked as Wynne Exhibit 1.

By agreement the report is to be withdrawn and a photostatic copy substituted.

Mr. Grace: I object to the offer of the report as evidence, but I have no objection to Captain Wynne referring to it to refresh his memory.

(The document was mrked (sic) as Wynne Exhibit 1.)

Mr. Lemle: For the record, the figures 9985 which ap-
[fol. 267] pear in the upper righthand corner of the photostats are no part of the survey report, but is my file number.

Q. Now, Captain Wynne, going to this report, page 2, third paragraph, will you read that to refresh your memory and tell us, with your memory refreshed, whether on September 23 you received a call from Mr. Frieler's secretary, and what you agreed to with her?

A. "At 10:00 a.m. on Saturday, September 23, 1944, I received a call from Mr. Frieler's secretary advising me that the barge had arrived and that it was laying low in the water forward but that it was in safe position, and that discharging of the barge would not commence until 8:00 a.m. Monday, September 25, 1944, when Mr. Frieler had returned from a business trip to Corpus Christi. Mr. Frieler's secretary further advised me that she had contacted the River Terminals Company who had informed her that the barge was no lower in the water than it had been when leaving Port Arthur to continue the voyage to Texas City."

This paragraph does not refresh my memory concerning the statements in the paragraph as to the conversations with Mr. Frieler's secretary. It is apparent that I did have some conversations with her which were the basis of inserting this paragraph in this report. However, my memory does not carry me back to the details in connection with it.

Q. At that time was your memory of what had occurred better than it is today?

A. Possibly. I was seven years younger then.

Q. Would you have inserted such paragraph in your
[fol. 268] report if you had not had the conversation which it purports to relate?

A. No, sir, I would not.

Q. Pass on to the next paragraph, Captain Wynne, and see if that refreshes your memory.

A. Do you wish me to read that?

Q. Yes.

A. "At 2:00 p.m. on September 24, I received a call from Mr. Frieler's secretary advising me that the barge was in a sinking condition and asking would I suggest what had best be done in connection with the matter. I advised them, upon receipt of this information, that they had best begin lightering the barge without delay to prevent the barge from sinking; and immediately went to the location at Texas City. I arrived on board the barge at 2:30 p.m. and found at this time that the barge had sunk forward, the bow resting on the bottom of the slip with the stern afloat. I was advised at this time that this was the position the barge was found in at daylight on this date as reported by the United States Coast Guard. At this time pumps were going and a mixture of molasses and water was being pumped overboard from No. 6 tank to keep the stern of the barge afloat."

This does not refresh my memory with respect to any conversation with Mr. Frieler's secretary. It does refresh my memory with respect to visual examination of the condition of the barge at that time. In other words, what I am trying to say is that I do not remember the conversations so well, but I do remember the eye picture that I had of the barge.

Q. Would you have inserted such paragraph in your report if you had not had a conversation such as related in that paragraph?

[fol. 269] A. No, sir.

Q. Pass on to the next paragraph, Captain Wynne.

A. "I inquired at this time as to the whereabouts of Mr. Frieler and was informed that he had just passed through Houston and was en route to Texas City and that he was expected within an hour. I suggested at this time that they should continue to pump on the tanks they were then pumping and discharging overboard, since this effort was keeping the stern of the barge afloat and the mixture of molasses and water coming out was so heavily impregnated with water that it was not usable as molasses."

This paragraph does not refresh my memory with respect to any conversations held concerning the matter at that time. As stated before, it does refresh my memory relative to the physical condition of the barge.

Q. Would you have inserted that paragraph in the report if you had not had a conversation such as therein related?

A. No, sir.

Q. Captain, I don't want to put it in the record by reading this entire report into it. Will you read the next paragraph to yourself, this first paragraph commencing on page 3.

A. All right.

(The witness complied.)

Q. Does that refresh your memory?

A. No, sir, it does not.

Q. Then Captain you will have to read the paragraph into the record.

A. All right, sir.

[fol. 270] "At 3:30 p.m. Mr. Frieler arrived on board, tested the molasses being pumped overboard and found that it was mixed too heavily with water to be of any commercial value, after which the pumps were switched to another tank, the molasses from this tank tested, the water content at that time being such that in his opinion it was safe to pump the molasses into the short tanks. Valves in the shoreline were opened up, overboard valves closed, and the work of transferring this molasses to the shore tanks begun. After pumping approximately an hour water appeared in this tank in such quantities that no more of the molasses could be pumped into the shore tank and pumping overboard was continued."

This does not refresh my memory in connection with this paragraph.

Q. Would you have inserted such a paragraph in your report if the occurrences related in the paragraph had not taken place?

A. No, sir.

Q. Captain, in the next paragraph, you give your computation of the loss. Do you have any independent recollection of those computations?

A. No, sir, I do not.

Q. If you do not, I suggest you read that into the record.

A. "Prior to pumping the molasses into the shore tank, gauges were taken of the shore tank; and since from this point on no further molasses were at any time pumped into the shore tank, gauges were taken on the following day for the purpose of determining how much molasses had been pumped into the shore tank. The result of this was as follows:

[fol. 271]

Open	gauges	3′ 05¾″
"	"	3′ 06″
"	"	3′ 05⅝″
"	"	3′ 03½″
Finishing	gauges	3′ 07⅝″
"	"	3′ 08″
"	"	3′ 06″
"	"	3′ 05¾″

Average difference in gauges between opening and closing 2⅛", equivalent to 9,919 Gallons less 694 Gallons allowance for water due to difference between 43 and 40.50 Beaume. Net amount received into the tank according to calibration of tank 9,225 Gallons. Total amount said to have been shipped 140,158 Gallons. Net amount apparent loss 130,933 Gallons.

This paragraph does not refresh my memory with respect to the contents in it.

Q. At the time you gauged the tank and made the computation, which is recited in that paragraph, was that the information that you determined and which you incorporated into this paragraph?

A. I am not sure at this time whether I actually made these gauges or whether they were obtained from Mr. Frieler. I have no recollection of actually taking these gauges personally.

Q. Are you able to say whether it was one or the other, whether they were computed by you or received from Mr. Frieler?

A. It would be either computed by me or received from Mr. Frieler's office.

Q. And the computation which follows the gauges, was that computation made by you or did you get that computation from somewhere?

[fol. 272] A. I am not certain. I don't remember. But it would be from information—this would have been obtained jointly in conference with Mr. Frieler.

Q. Read the next paragraph and see if that throws any light on the matter.

"The above figures corresponded to those of Mr. Frieler, who was, at this time, satisfied as to the correct amount involved. Later Mr. Frieler complained that this figure was in error due to the fact that the foam on the molasses had not been taken into consideration when the gauges were taken, and that his records made from the delivery of the molasses out of the tank to consumers were to the effect that only 4,555 gallons had been received, instead of 9,225 gallons. I cannot agree with Mr. Frieler in this connection as the condition of the molasses in the shore tank were exactly the same at the time the opening and closing gauges were taken. If the foam effected the gauges at the time of the opening, the same condition must have existed at the time of closing."

Q. I have no interest in Mr. Frieler's statement. You can stop there.

A. This does not refresh my memory in connection with the matter.

Q. Nevertheless, at the time you wrote the report that was your impression and your opinion, or you would not have put it in the report, is that so?

A. Yes, sir, that is true.

Q. Captain Wynne, go to the last paragraph on page 4 and the first paragraph on page 5 and read those together [fol. 273] ingo (sic) the record and see if they refresh your memory.

A. "Every effort was made, under the direction of Mr. James Gleave, surveyor for the River Terminals Company, who were attempting to raise the barge by pumping the water mixed with molasses from the forward compartments of the barge. It was found that the tanks were leaking so fast that the pumps could not raise the barge in this manner.

"A diver from the Munez Construction Company was sent down to manipulate the valves on the forward compartments of the tanks which were under water and to examine the condition of the barge. The diver reported that all of the manholes were leaking badly, valve stems leaking around the collars where they came through the deck, and the decks leaking where the seams were welded."

I have a general memory of the contents of this paragraph, but not a specific or detailed memory of it. I do remember that the barge was found to be leaking around the valve stems. That I have got a clear recollection of. But the rest of the contents of the paragraphs I remember only in a general way.

Q. That was your memory and opinion you had at the time you wrote it, Captain Wynne?

A. Yes, sir.

Q. Now, one minute about these valve stems. Explain about the leaks in them.

A. The valve stem, as I recall, came up through collars in the deck, and the deck around the valve stems was in bad condition, showing signs of corrosion and leaking, as well as the stems not being packed and made tight.

[fol. 274] Q. Is it the practice and customary to keep those deck connections watertight?

A. Yes, sir.

Q. Captain Wynne, come down to the second to the last paragraph on page 5 and read that, and the last paragraph on page 5, the first paragraph on page 6, and the second paragraph on page 6.

A. "At 8:00 a.m. on October 3, I carefully examined the condition of the barge, insofar as possible with the barge afloat, and found that the holding down lugs on the manhole on the forward dry rake were corroded so badly that it would have been impossible to have made this manhole watertight as the nuts could not be worked on the boat and the cover screwed down tight.

"It was also found that the gaskets in all of the manholes leading into all of the compartments were in a very badly deteriorated condition; none of the manholes being in such condition that they could be fastened down and made watertight.

"The valve stems leading up through the deck were not packed, which allowed water to enter the compartments from these sources quite freely.

"The barge was placed on the dry dock at the Port Houston Iron Works, Houston, Texas, on October 11, 1944, after which I examined the bottom of the barge and other underwater parts and found that the third plate forward on the starboard side, second strake from the deck, was very badly wasted; numerous holes wasted in the plate, the diameter of those holes ranging from one-half inch to two inches. There was no evidence of the barge having been in a collision."

Now my memory, insofar as the paragraphs I have just [fol. 275] read, takes me back to the condition of the manholes. I do remember the manholes being in the condition as stated in this report. I do not have a clear memory of the condition of the shell plating, as stated in the report.

Q. Captain Wynne, when you wrote your report, did you have such memory?

A. I would have had, yes, sir.

Q. Captain Wynne, particularly I call your attention to the last sentence that you read: "There was no evidence of the barge having been in a collision." Are you able at this time to confirm that, aside from the report, or not?

A. No, sir. I would have to rely on the report.

Q. Does that report state what you found at that time?

A. Yes, sir.

Q. Captain Wynne, how long have you been a marine surveyor?

A. Better than 23 years.

Q. You have represented the Board of Underwriters for how long?

A. The same time. I have been with them all that time.

Q. How many barges would you say you have seen in that time?

A. It would be difficult to say. A good many.

Q. Hundreds of them?

A. I would think it would run into thousands, certainly.

Q. Captain Wynne, did you express any opinion as to what caused this barge to sink, any professional opinion?

A. No, not at this time, I don't think I could.

Q. Did you at that time express one?

A. I would have to examine the report more closely.

[fol. 276] Q. Will you read the next paragraph of your report?

A. "In view of all the above it is the opinion of the undersigned surveyor that the cause of this barge sinking and the subsequent loss to the cargo was due to unseaworthiness of the barge at the time of sailing from Reserve, Louisiana, on November 16, 1944. This unseaworthiness being due to the above mentioned plates being badly wasted, allowing water to gradually enter the forward cargo compartments of the barge to such an extent that during the night of September 23, or the early morning hours of September 24, while the barge was lying at Texas City water came over the deck of the barge, entering the dry rake compartment forward, and in turn subsequently entering through the deck openings along the barge until the barge had shipped sufficient water to cause the forward end to sink."

My memory insofar as this paragraph is concerned is as to the condition of the deck of the barge and the water entering the dry rake. I remember that distinctly. I do not remember the conditions with respect to the underwater part of the barge.

Q. Did you have that opinion at the time you wrote this report which is embodied in the report?

A. My opinion at that time would have been the same as embodied in the report.

Q. Captain Wynne, read the second to the last paragraph of your report on page 7.

A. "In connection with efforts to salvage the cargo insofar as possible, all recommendations were carried out to the satisfaction of the undersigned surveyor."

[fol. 277] Q. Can you state whether or not that refreshes your memory as to who you were representing, or whether you were representing the cargo?

A. My memory—I am not speaking from memory in connection with the matter. I am referring to the fact that in the report of survey itself, wherein it states that I was acting at the request of Messrs. Appleton and Cox, Underwriters.

Q. But you do not know whether they were underwriters for the cargo, and I ask you that question because all through this report we are dealing with cargo.

A. I wouldn't say for certain. I am under the impression they were cargo underwriters.

Q. To whom were copies of this report sent, do you know, Captain?

A. Copies of this report would have been sent to only Messrs. Appleton and Cox, Underwriters. They might have sent their report to them and the Board might have retained a copy.

Q. Do you know whether or not copies were sent to Southwestern Sugar and Molasses Company?

A. Not to my knowledge, no, sir. Not from me direct.

Mr. Lemle: I tender the witness.

Cross examination.

By Mr. Grace:

Q. Captain Wynne, you read from the third paragraph on page 2, that at 10:00 a.m. on Saturday September 3, 1944, you received this call from Mr. Frieler's secretary advising that the barge had arrived and that it was low in the water forward but that it was in safe position. [fol. 278] Now you didn't see the barge at the time of course so you don't know whether it was in safe position or not?

A. I don't recall whether my report indicates that or not.

Q. Unless you had seen the barge you wouldn't have known whether it was in a safe position or not, would you?

A. No, sir.

Q. And if it was low forward would you consider that still in a safe position without knowing how low forward it was laying?

A. I would have to know what the exact condition was before I could say exactly.

Q. You would have to know?

A. Yes, sir.

Q. And you also took into consideration the fact that

she advised you that she was informed by River Terminals Company that the barge was no lower in the water than it was when it left Port Arthur for Texas City?

A. I have no memory of that conversation.

Q. I presume you took that into consideration when she said it was in a safe position?

A. I don't know what the condition of the barge was. I didn't see it.

Q. I notice in the next paragraph that you got another call at 2:00 p.m., and you arrived at scene of the barge at 2:30 p.m. the same day and found the barge had been sunk?

A. That is what the report states, yes.

Q. So it was only four and a half hours after you got the [fol. 279] first call that you were at the scene of the barge and found it sunk?

A. According to the report, I received the first call at 10:00 a.m. on Saturday the twenty-third.

Q. I am sorry. It was the next day. It was the next day you received the report at 2:00 P.M.?

A. At 2:00 p.m. on September 24, a day later, I received a call.

Q. I am sorry.

A. That would be something over a day. A day and four hours.

Q. Now these gauge readings, you say you either made them or Mr. Frieler made them, and you accepted them if Mr. Frieler made them?

A. Did I accept them?

Q. I say you accepted them as correct?

A. Yes, sir.

Q. Now, in this last paragraph on page 4 where you say: "Every effort was made, under the direction of Mr. James Gleave, surveyor for the River Terminals Company, who was attempting to raise the barge by pumping the water mixed with molasses from the forward compartments of the barge." Do you know what day that was, and what time of the day?

A. No. The report doesn't reflect it.

Q. You do not know how long that was after the barge had sunk?

A. No, sir.

Q. And you do not know how long after the barge had been sunk that divers went down and reported the bad manholes?

A. No, sir.

Q. Now if the tank compartments of this barge were not [fol. 280] filled, there was nothing but air in the compartments when the barge sank?

A. Prior to the sinking, yes, sir. Not after she sank, for they were leaking.

Q. Wouldn't the air attempt to escape as she sank?

A. It would be escaping as she sank and perhaps until some of it was flooded with water.

Q. Wouldn't that have some effect on the gaskets and manholes?

A. I don't believe so, no, sir.

Q. You don't think it would have?

A. I don't think it would have.

Q. Now I notice on page 6, in the third paragraph you conclude that barge was not seaworthy because of the condition of the plate which you identified in the paragraph above, "the third plate forward on the starboard side, second strake from the deck." That is correct, isn't it?

A. Yes.

Q. In other words, you didn't attribute any unseaworthy condition, or lack of it, found in the barge, to the condition of her No. 4 tank before she left Reserve, Louisiana?

A. My report doesn't seem to indicate that.

Q. You had not seen this barge before September 24, 1944, had you?

A. Not that I know of. It is possible that I might have.

Q. You do not know the condition of this plate while it was at Reserve, Louisiana?

A. No, sir.

Q. Couldn't the stress and strain of a plate, because [fol. 281] of the fact that it was sunk and the raising of it, have caused the pitholes to open and the rust flake off the plates?

A. It is possible.

Q. Could have caused the condition you found in it?

A. Possibly.

Q. So then the condition of this plate may not have been the same when it left Reserve, Louisiana, as shen (sic) you found it?

A. It could have been different, yes, sir.

Q. Do you know the voyage this barge took from Reserve, Louisiana?

A. No, sir.

Q. Well, if it left Reserve, Louisiana, and went down the Mississippi River to Harvey, Louisiana, and through the Harvey Locks, and then by way of the Intracoastal Waterway, regular route over to Port Arthur, Texas, and then to Galveston Bay, and then through Galveston Bay to Texas City, Texas, for the barge to have made that journey successfully, it would have been seaworthy when it left Reserve, Louisiana?

A. Not necessarily, no, sir.

Q. If it had not been seaworthy, what would the condition have been caused by during that voyage?

A. What would have transpired during the voyage?

Q. Yes.

A. She might have leaked continuously on the voyage, but not to such extent that she could not have been kept pumped out on the voyage by proper attendance on the pumps.

Q. Suppose she had not been pumped out?

A. If she had not been pumped out, in the condition I [fol. 282] found her, as stated in this report, she would have leaked. Whether she would have leaked sufficiently to have sunk her prior to the time she did sink in Texas City, I wouldn't be able to say.

Q. Even though she left Reserve, Louisiana, on September 17 and did not arrive at Texas City until September 23, over a period of six days, what would you say about that?

A. I would say it would be purely a guess on my part. I don't know how much water she was taking, or whether she was taking enough to sink her or not.

Q. Now if she was down at the forward end when you were called at 10:00 a.m. on the twenty-third, would you say it would have had to have been the cause of the sinking the following day when you found it sunk?

A. I don't know. I think that before she sank she would have had to have been down far enough for water to have run over the deck and into the manholes, or in the imperfections on deck, which would have allowed the water to have gotten into the cargo compartments.

Q. She would have had to have been low enough for the water to run over there?

A. It would seem so, yes, sir.

Mr. Grace: That is all.

Redirect examination.

By Mr. Lemle:

Q. Captain Wynne, one more question. In looking through the records, while you were answering Mr. Grace, I found a copy of a letter dated January 6, 1948, signed [fol. 283] by you and addressed to Messrs. John D., M. A., and Edwin H. Grace, which they have filed in the record in answer to interrogatories addressed to them. I ask you to read that letter and see if you have any recollection of that matter and if it refreshes your memory in any way.

A. Read it in the record or to myself?

Q. No, to yourself.

A. I have no recollection of having written the letter. I do remember the conditions as set forth in the letter.

Q. Will you reaffirm that opinion at the present time?

A. Yes, sir.

Q. As contained in the letter?

A. Yes, sir.

Mr. Lemle: In connection with the testimony of the witness, I offer copy of the letter in evidence and ask that it be marked as Wynne Exhibit 2.

I ask that the copy of the letter of September 21, 1944, to Captain Wynne be marked for identification as Wynne Exhibit 3.

(The documents were marked as Wynne Exhibit 2 and Wynne Exhibit 3, respectively.)

Mr. Lemle: I am finished.

Mr. Grace: Let me see those.

Recross examination.

By Mr. Grace:

Q. Captain Wynne, I note here by copy of this letter identified as Wynne Exhibit 2 where you say that even though [fol. 284] the manholes were corroded, that you make reply to our letter of December 30 with respect to the manholes. Do you recall whether or not we asked you if the corroded condition existed, could the crew have opened the manholes, to which this apparently would be an answer?

A. What is the question you are asking?

Mr. Grace: Read the question.

(Question read.)

A. I do not recall what it was you asked me.

Q. According to this letter, even though the conditions existed that you found, all the crew had to do was to kick the lug over and open it.

A. I remember that condition, yes, sir.

Q. So that even had a corroded condition existed during the voyage, they would have had access to the compartment to have pumped water out?

A. I remember that condition.

Mr. Grace: That is all.

H. B. Lambdin was called as a witness in behalf of the respondent, and having been first duly sworn, testified as follows:

Direct examination.

By Mr. Lemle:

Q. State your name, age, residence, and occupation?

A. My name is H. B. Lambdin. I am 54 years old. I am a marine surveyor.

Q. You live at?

[fol. 285] A. I live at 5715 H.M.C. Street, Town and Country Apartment, Houston.

Q. Mr. Lambdin, do you plan to be in New Orleans at the trial of this case?

A. No, I don't.

Q. Captain Lambdin, how long have you been a marine surveyor?

A. Since May, 1942.

Q. And before that?

A. Before that I was five years with the steamboat inspectors.

Q. And your position with the steamboat inspectors?

A. Assistant Hull Inspector.

Q. And before that?

A. Prior to that I was going to sea and was Master of ships.

Q. For how long?

A. Altogether, I was 12 years Master of ships.

Q. Captain Lambdin, in your experience would you undertake to say how many barges you have seen?

A. Practically every one I guess that has been around this district since 1937.

Q. Would that run into hundreds or thousands?

A. It would run into thousands, I imagine. I have looked at the same ones several times. We are right now on our 4700 and some case, surveying business.

Q. Captain Lambdin, tell us whether or not you had any connection as a surveyor with the barge "Peter B." following her sinking at Texas City, Texas, in September of 1944?

A. Yes, I did.

[fol. 286] Q. Who did you represent?

A. I represented the Southwestern Sugar and Molasses Company.

Q. Southwestern Sugar and Molasses Company?

A. That is, after the barge was raised and brought up to Houston and dry docked.

Q. Did they employ you and pay you?

A. Yes.

Q. Captain Lambdin, have you a file on this survey and loss?

A. I have.

Q. Will you produce it?

A. I brought it with me to refresh my memory.

Q. Captain Lambdin, tell me if you have any records of the Southwestern Sugar and Molasses Company? Did they turn the records over to you?

A. I have copies of all their records.

Q. In the reply to interrogatories that the River Terminals Corporation addressed to the Southwestern Sugar and Molasses Company they have replied that all their records were lost in the Texas City fire. Can you supply me with any copies of their records?

A. I have a complete copy in this file here.

Q. Where did you get them from?

A. I got them from Southwestern Sugar and Molasses Company. I have a letter under date of October 12, 1944, signed by Mr. L. H. Frieler in which he says that he promised me he would mail me the entire file on the "Peter B." since the time of loading up to the time of sinking at Texas City, and that since he has to keep the original [fol. 287] file, he is making copies of the entire correspondence, and that the complete file would be mailed within a few days; and that they would appreciate our mailing them copy of our correspondence with E. I. Kaplan, 91 Wall Street, New York.

Q. Is that the file you hold in your hand?

A. Yes.

Q. Where has that file been since you got it in 1944?

A. It has been in my office.

Q. Are you willing to surrender that file to me?

A. I am willing for the file to go in the record here.

Mr. Grace: I may say I have no objection to whatever correspondence there is in the file in answer to the interrogatories, but I do not admit that they can be offered in evidence because, as stated, our records were burned in the Texas City fire and disaster.

Mr. Lemle: Will you file that record in reply to inteerogatories? (sic)

Mr. Grace: If he furnishes me with the record I will be glad to do so, or copies.

The Witness: There are two sets in here, one that we made for ourselves and one that the Southwestern Sugar

and Molasses Company made. If you want a copy and you want a copy, if it is in order, I will give them to you. I have no further need for them.

[fol. 288] Mr. Lemle: All right. I will say for the record I have not seen this file.

Mr. Grace: I may also say that neither have I, except, of course, what letters I may have written.

The Witness: I would like to make a statement in here too, that a copy of this file was handed in along with my report.

Q. With your survey report?

A. Yes. That is why we made the copies.

Mr. Grace: May I ask who you sent the report to?

A. The report went through J. S. Gissell's office to Mr. Kaplan. I presume he got them.

Mr. Grace: Off the record.

(Discussion off the record.)

Mr. Lemle: For the record, I state that at the time that Mr. Grace handed me a copy of Mr. Lambdin's report, there was attached to it certain letters. Not having seen this file yet, I do not know whether it reproduces those letters or whether there is anything different. I am simply seeking this information in connection with the interrogatories.

The Witness: Here is the complete file that was sent me from the Southwestern Sugar and Molasses Company.

[fol. 289] Mr. Lemle: It contained a number of letters, a fairly thick letter file, which I read and returned to Mr. Grace, as I had no use for those particular letters.

Q. Captain Lambdin, have you an independent recollection of this matter?

A. Yes, I think so.

Q. Have you a survey report?

A. Yes. I have that right here.

Q. What date was the survey report made?

A. The survey report was written on October 26. It covered surveys made on October 11 and subsequent dates through October 21, 1924. (sic) It is our Case No. 1545.

Q. From your survey of this barge, can you tell us just

how the barge was constructed originally and how she was converted?

A. The barge was originally a hopper type barge, 175 feet long by 26 feet beam, by 11 feet deep, and had three cylindrical tanks on her sides and amidships, and then the other compartments, the balance of the compartments, divided into six other cargo tanks; and at the after end, just behind the after cylindrical tank and the after rake bulkhead, there was a pump room built into the hull, with a metal house over it.

Q. Have you in your file any diagram that shows the way that this barge was constructed?

A. I have, yes.

Q. Does that show the original construction or conversion?

A. That shows the conversion. These are sketches that were made at the time of the survey.

[fol. 290] Q. All right, Captain Lambdin, referring now to this sketch, this sketch that consists of one plan of a barge, I assume looking down on the deck.——

A. That is right.

Q. And underneath are two profile plans?

A. That is right.

Q. All right. Now going to the first sketch, which is looking down on the deck, you show three rectangles.

A. These are cylindrical tanks lying on either side.

Q. One, two, and three?

A. Yes.

Q. One, two and three on the amidships line?

A. That is right.

Q. What are these tanks, Nos. 1, 2, 3, 4, 5, 6, 7, and 8?

A. They are the balance of the original cargo compartments subdivided by transverse and longitudinal bulkheads to form eight more tanks.

Q. Then these lines, athwartship lines——

A. These represent bulkheads.

Q. And the fore and aft lines?

A. That is bulkheads also. Those are longitudinal bulkheads and those are transverse bulkheads.

Q. And the small rectangular space on the lefthand side——

A. This is the forward rake, and this is the after rake, and this is the pump room.

Q. These rakes are dry tanks?

A. Yes, sir.

Q. Not intended for cargo?

[fol. 291] A. Not intended for cargo or for water.

Q. And the pump room was what?

A. The pump room is a place where a pump is installed, and is also a dry compartment.

Q. Now, on the second sketch, that shows the same thing looking at it in profile?

A. That is right. These dotted lines represent bulkheads, and also the foundations upon which the cylindrical tanks rest.

Q. What are these protuberances above the deck?

A. Those are the cylindrical tanks. They extended above the decks. I think there are some photographs that will show exactly how they were fixed above the deck.

Q. And the third?

A. The third, the shaded area on the third is the wasted section of the side, the heavy scale, and these little dots in here represent holes wasted in the barge at the time it was examined, that we found after the scale was removed. It was loose scale, and when it was knocked off, there were pinholes present in it.

Q. On this third sketch you show the stern——

A. This is the starboard side of the barge. This is the port side of the barge. In the second drawing——

Q. No, the first drawing.

A. That is the deck, and this is the stern here.

Q. Will you write "stern" and "bow" on those first two sketches?

A. (The witness complied.)

Q. Captain Landolin, what have you to say in your professional opinion as to the efficacy of that conversion, particularly with regard to the buoyancy?

A. I don't think it is a good conversion because there is too much buoyancy at the aft end of the barge and very little at the forward end.

[fol. 292] Q. What effect does that have?

A. It has this effect, that if the forward rake should get a little water or something in it, the barge loses all buoyancy entirely at the forward end and will go down, whereas if she took water in the after rake, with the pump room back there, she would still have sufficient buoyancy to retain the after end afloat.

Mr. Lemle: I ask that this sketch be marked as Lambdin Exhibit 1.

(The sketch was marked as Lambdin Exhibit 1.)

Q. Captain Lambdin, what is that sketch?

A. That is a sketch we drew up while making measurements of the barge in order to work out the exact space the tanks occupied, the space the pump room occupied, and the space the rakes occupied. This sketch was not made by me. It was made by Mr. L. H. Herd, who was surveyor working for me at the time because Mr. Bencal was in the Army. That is his writing on that one.

Q. Captain Lambdin, will you tell us when you first saw this barge? Did you ever see this barge before she sank?

A. No.

Q. Will you tell us when you first saw her following the sinking?

A. I first saw her after it had been raised and brought to Houston and put in the Port Houston Dry Dock.

Q. Was it on the dry dock that you saw her?

A. It was on the dry dock that I saw her.

Q. Will you tell us, Captain Lambdin, generally what you found?

[fol. 293] A. Well, I found that the barge, the side of it, especially the starboard side, had heavy, loose scale on it, and found several openings in the deck of the barge. I found the manholes on the deck were bolted shut, with the dogs corroded on them, and the gaskets were missing in some of them. And I found where, due to the barge being sunk, the deck had been pulled in the way of the foundations and the mountings for the cylindrical tanks and allowed several openings in the barge. And after we knocked them loose, and the scale off, we found several wasted holes through the plate of the barge. These were not visible until

the side was hit with a hammer and the scale fell off and then it exposed the holes.

Q. Captain Lambdin, did you have some photographs made of this wasted area?

A. I did.

Q. I show you three photographs that have already been marked as R T C 8, R T C 9, and R T C 10, and I will ask you if those photographs show the wasted area in question?

A. They do. This one particularly shows it.

Q. This one being R T C 8?

A. No. 9 shows it, and also shows several of the holes which I have been talking about. There is a hole there, one there, and there is a big one which we tapped with a hammer and enlarged at the time because it was much larger than the others and tissue paper thin. Here are one, two, three, four, five, six there.

Q. Captain Lambdin, you have been referring to R T C 9. Will you take a pencil and draw a circle around those holes [fol. 294] to focus attention on them?

A. I can do better with ink, I think.

Q. With a pen?

A. (The witness complied.)

Q. All right, R T C 10, what does that show?

A. The same thing.

Q. R T C 8, 9, and 10 are photographs of the same thing from different angles, aren't they?

A. That is right, sir.

Q. Captain Lambdin, I show you three more photographs, RTC 5, R T C 6, and R T C 7, and ask you if those were taken under your supervision?

A. Yes, they were.

Q. And were they taken while the barge was on dry dock, at the same time?

A. Yes.

Q. Now look particularly at photograph R T C 7, and I ask you if that shows the deck construction as to the extension of the cylindrical tanks above the deck?

A. That does, yes. That is a photograph of that barge looking from the bow to the stern, and it shows the

cylindrical tanks in the center of the barge, the reach rods, and the cargo valves, pipeline. That is the steam pipeline, this small one. It also shows an indentation in the deck of the barge, with water lying in a puddle, on the port side of the deck, which is here. And it shows the manhole opened in the way of the cylindrical tank there on the star- [fol. 295] board side of the barge, which I think was No. 1 tank. I am sorry. That is No. 2 tank, because they number from one to starboard. It also shows crossover line at the after end, the forward end of the pump room, and shows some of the single post mooring bitts on the barge.

Q. Look at photograph R T C 6. What is that?

A. That is a part of the deck of the barge looking from aft forward. That also shows the tips of the cylindrical tanks above the deck of the barge. It shows a manhole open in the way of No. 7 tank. It shows the deckhole open at the forward port corner of No. 3 cylindrical tank, which is here. It shows the holes cut in the barge in order to pump it out during salvage operations, which are here and here.

Q. Will you put an "x" by those holes?

A. (The witness complied.) They were cut in order to get pump suction in when they raised the barge.

Here is the area where the deck is pulled up.

Q. Will you mark that with an "A".

A. (The witness complied.)

Q. Captain Lambdin, what is this in the forefront I am pointing to with my finger?

A. That is the gasket of the manhole.

Q. Mark that with a "B".

A. (The witness complied.)

Q. What condition did you find those gaskets in on the barge?

A. This particular one was in half here on the back outside corner. Three studs are out of this one which is shown here in the picture.

Q. Without going into detail, generally what condition did you find the manhole covers in as to studs and nuts [fol. 296] that hold them down, bolts or whatever you choose to call them, and the gaskets?

A. Well, they hadn't had any maintenance for a long period of time. There were several studs missing that will show in the picture, and the gaskets were in poor condition, and they were hard to get open, and some of those studs were stripped in the operation of opening the manholes up. You can see there, and here. There are eight missing out of that one.

Q. Will you mark that with a "C"?

A. (The witness complied.) Over on this one you have got two, three, four, five, six missing out of this one on the starboard side. And this one on the No. 5 tank, and this is No. 6 tank here.

Q. Without going into too much detail, generally what have you to say as to whether or not (sic) the deck of the barge was watertight or could be made watertight?

A. I will say this, the deck of the barge was not watertight when I saw it, and due to the flimsy construction of it, I don't think it could be retained watertight, regardless of the amount of repairs done to it, unless it were of heavier construction that what it was.

Q. What have you to say as to the hatch vovers (sic) on the forward rake tank and the dry tank? Did you make any inspection of that?

A. Yes. They were in poor condition. The manhole covers and the gaskets on the forward rake were in poor condition.

Q. And as to the watertightness on deck around the valve stems, what have you to say to that?

[fol. 297] A. There was a crack on the deck, and I see on this survey report an item which says: "Well deck plating partied in several places". It says deck seam in way of middle portside portion of No. 1 hatch open.

Q. Take Item No. 8.

A. "Reach rods, cargo valves bent." They extend pretty well above the deck and that could have been done in salvage work. The bulkhead and cylindrical tanks within the hull were leaking.

Q. Did you express any opinion as to what caused this barge to sink?

A. I did, yes.

Q. Tell me, did you find any evidence of a collision?

A. No, there was no evidence of collision.

Q. Or evidence of the barge having struck anything to fause (sic) those holes?

A. No, sir. Those holes were definitely from deterioration.

Q. You say you expressed a definite opinion?

A. Yes.

Q. Will you state what that was?

A. In my opinion, the barge sank as the result of water coming into the No. 1 tank of the barge and leaking from there into the rake of the barge slowly, which caused the barge to go down by the head; and then as the barge went down by the head, the cargo in the barge had a tendency to run forward through the ullage in the tanks and increased the weight at the forward end, and with the bulkheads in the barge leaking, the cargo eventually kept creeping forward, and that, along with the small amount [fol. 298] of water coming in through these pinholes forward, killed all the buoyancy in the forward end of the barge and the barge set up on its head and went down.

Q. Did you put that opinion in your survey report?

A. I did.

Q. Did you express that opinion to the Southwestern Sugar and Molasses Company?

A. I did.

Q. Tell me, after this barge sank, was there a meeting which you attended and which was attended by a representative of the River Terminals Corporation?

A. There was.

Q. Who was that?

A. Mr. Johnny Dee.

Q. Who else attended that meeting?

A. Mr. Kaplan, the owner of the Southwestern Sugar and Molasses Company, Mr. Julius Gissel of Collins and Gissel, who was the agent for the Southwestern Sugar and Molasses Company, and myself.

Q. What discussion took place?

Mr. Grace: I object to this. I don't think that is at all admissable. (sic)

Q. Did you at that conference express your opinion?

A. Yes, I told Mr. Kaplan at that meeting I thought the tugboat had nothing to do with the sinking of the barge.

Q. Did Mr. Kaplan make any remark?

A. He did. He said: "Then I guess that lets the towboat [fol. 299] company out."

Q. Then what did Mr. Dee say?

A. Mr. Dee said: "There is no use of me staying here any longer."

And he went.

The meeting was called for a get together between Mr. Dee, Mr. Kaplan, Mr. Gissel, and myself to discuss this thing. Of course, there was some question at that time as to the condition of the barge when it was left at Texas City.

Mr. Lemle: I tender the witness.

Cross examination.

By Mr. Grace:

Q. Captain Lambdin, you never saw this barge before this occasion, I understand?

A. I saw it on the date I stated.

Q. That was after it had been sunk for a period of six days?

A. That is right.

Q. I show you a chart drawn by Mr. A. A. Grant, engineer, of New Orleans, Louisiana, and ask you to look at it and compare it with your drawing and tell me if it shows the description of this barge as you show it.

Mr. Lemle: I object to that on the grounds that this blueprint has not been identified, and I suggest that this is not a print of the barge as it existed, but was a print that was made for conversion of the barge which never took place.

[fol. 300] A. This print was made January 25, 1943. I don't know when the barge was converted. But it shows the locations of the tanks as they are shown in my drawing.

These structural features that are in this barge are put down here to show what they were originally, but he has not shown what they are after the deterioration over a period of years. I can use this to show that these compartments were in there. If you are producing that for

me to express an opinion on the strength of it, I wouldn't do it because it doesn't show any deterioration.

Q. I am not asking for your opinion. I only ask you if this would be a description of the barge as you saw it?

A. Yes, as far as the location of the tanks, yes.

Q. And the structure otherwise?

A. Yes.

Mr. Grace: For the purpose of identification, I will ask it be marked as Grant Exhibit 1.

(The document was marked as Grant Exhibit 1.)

Q. Captain Lambdin, you pointed out on these pictures R T C 9 and R T C 10 some holes.

A. That is right. This one here is not shown on this one.

Q. Except one additional one, RTC 10?

A. That is right.

Q. As I understand, you purposely enlarged that hole?

A. Yes, sir, this one only.

Q. Where was that located with respect to the tanks?

A. It was in No. 2 tank, starboard side.

[fol. 301] Q. If water came through that hole in No. 2 tank during the voyage, would that of itself have caused the sinking of the barge?

A. It would not have, provided the bulkhead and the rake had been tight.

Q. If that tank became flooded, that of itself would not have caused the sinking?

A. Yes, it would, if the rake became full.

Q. That by itself wouldn't?

A. That No. 2 tank getting water in it wouldn't in time cause the barge to sink, no.

Q. You designated these corroded manholes, et cetera on our R T C 6, 7, and 5. How far back were they from the front end of the barge?

A. These are pretty well back. This one is in No. 7 tank here. That is opposite No. 3 cylindrical tank. This one is in No. 2. That is right. This is about, I would say, about ten feet back from the bow of the barge.

Q. Well, that defect, if it existed prior to the sinking, that would not of itself have caused the sinking?

A. That is No. 2 tank?

Q. Yes.

A. I have already said that in itself would not cause the sinking, the manhole, because the manhole didn't really come into play until after the deck was submerged to the extent that water was on the deck.

Q. So then the manholes had nothing to do with the sinking of the barge?

[fol. 302] A. Not primarily, no. It contributed after the deck got down.

Q. Below the water?

A. Yes, sir, that is right.

Q. As I understand, you have mentioned that considerable damage was caused the upper deck in the sinking and salvage of the barge. Is that correct?

A. That is right.

Q. Well, now, this plate that you found on the side, could that have been caused by the sinking and the salvage of the barge?

A. Absolutely not.

Q. You do not think that the stress and strain to those plates could have caused the pitholes, to have caused the rust to flake off the sheet and caused the condition you found?

A. No.

Q. You don't think that could have occurred?

A. No.

Q. Now this barge having been under water six days, that of itself could have caused the corrosion, couldn't it?

A. It could have caused some rust, but it would not have caused the defects in the gasket.

Q. The fact that corrosion existed, that would not in itself have made the vessel nonwatertight?

A. No. The manholes didn't have anything primarily to do with the sinking of the barge. It was that deck getting under water, and the water was allowed to go in the manhole. As soon as the barge was afloat and the deck above [fol. 303] water, the manhole could not have done any harm.

Q. You knew that the voyage was from Reserve, Louisiana, to Texas City, Texas?

A. That is correct.

Q. Read from your report on the fourth page——

Mr. Lemle: I object to it. The report is not in evidence.

Q. The second to the last paragraph?

Mr. Lemle: I am going to insist on that objection, unless Counsel is going to put the report in evidence.

Mr. Grace: Counsel has asked Mr. Lambdin did he make a report to the Southwestern Sugar and Molasses Company, and he said that he did. This part of the report was not developed by Counsel on his direct examination.

Q. I am going to ask Captain Lambdin, will you read the first paragraph under your term "conclusions" on page 4?

Mr. Lemle: I object.

A. "The fact that the barge made the passage from Reserve, Louisiana, to Texas City, Texas, safely disproves any theory that the barge was unseaworthy at the beginning of the voyage."

Q. That was your opinion after your examination of the barge?

A. No. That was the fact that the barge made the voyage. It made the trip to Texas City all right. The barge made the voyage, the owners knowing it had a leak in it. [fol. 304] The owners fixed the leak and the tug brought the barge to Texas City.

Q. That was your opinion when you rendered your report?

A. That is right.

Q. As contained in what you read?

A. Yes, sir.

Mr. Grace: That is all.

Redirect examination.

By Mr. Lemle:

Q. Captain Lambdin, did the amount of corrosion which you found in these manholes' lugs and nuts, could that have occurred in the six days that this barge was sunk?

A. No. The salt water at Texas City would cause some corrosion to the studs and the nuts, but it wouldn't affect

the gaskets. What I mean, had they been well greased and taken care of, they still wouldn't have froze up so they couldn't get them off without stripping.

Q. Getting back now to your survey report dated October 16, this is the report which you have just read and which has been referred to by Mr. Grace?

A. That is right.

Q. You have an item here under date September 16. Did you see the barge on that date?

A. This is from this file I gave Mr. Grace that was furnished me by the Southwestern Sugar and Molasses Company that deals with everything up until I saw the barge on the dry dock.

Q. When was that?

[fol. 305] A. And that was on October 11.

Q. October 11?

A. Yes.

Q. Was that all entered in that report, prior to October 11——

A. Or taken from this record.

Q. And not from your personal knowledge?

A. No. I never saw the barge prior to that.

Mr. Lemle: I ask that the report be marked as Lambdin Exhibit 2.

(The report was marked as Lambdin Exhibit 2.)

Mr. Lemle: In connection with the testimony of the witness, I offer in evidence all those portions of this report except the recitals September 16 to October 10, inclusive, which the witness says are heresay. (sic)

I also offer in evidence Lambdin Exhibit 1, and the photographs R T C 5, 6, 7, 8, 9 and 10.

Would you initial those on the back?

(The photographs were initialed "A T" on the back.)

Mr. Lemle: I think that is all.

Mr. Grace: That is all.

J. M. STOVALL: was called as a witness in behalf of the respondent and, having been first duly sworn, testified as follows:

[fol. 306] Direct examination.

By Mr. Lemle:

Q. Please state your name, age, residence, and present occupation?

A. John M. Stovall., Age 58. I live at 5015 Winnetka. I am presently employed as Manager of Operations of Dixie Carriers Inc., Houston.

Q. Do you propose to be at New Orleans for the trial of this case?

A. If I am called on, I will be there.

Q. Will you be there unless you are called?

A. No, sir.

Q. In other words, you are not going to go over to New Orleans, are you?

A. No.

Q. Were you ever employed by River Terminals Corporation?

A. Yes, sir.

Q. When and for how long?

A. I was employed by them on December 16, 1943, as General Agent, and remained with them up until the time they were taken over by Dixie Carriers.

Q. And what was your position with the River Terminals Corporation in September of 1944, and particularly on September 23 and September 24?

A. I was Assistant General Agent.

Q. Located where?

A. At 5809 Navigation Boulevard.

[fol. 307] Q. Where was the office of the company?

A. The general office was in New Orleans. Our office was located on Navigation Boulevard.

Q. Mr. Stovall, we are examining into the sinking of the barge "Peter B." at Texas City the last part of September, 1944. Will you tell us whether or not you had any telephone conversations with Mr. Frieler's secre-

tary, Miss Warda Weirtenberger? Did you have any telephone conversations with her?

A. I did.

Q. Do you recall when it was that you had the first one?

A. Well, it was the early morning of Saturday on September 23.

Q. Did you call her or did she call you?

A. She called me.

Q. What time did that call come through?

A. Between 8:30 and 9:00.

Q. What did she say to you?

A. She told me about the barge "Peter B." which had been dropped in there by the tug "Dottie D." apparently after midnight and said the barge seemed to be in bad shape.

And I said: "I can't understand that. It was not reported to me as being in bad shape."

And it happened that the Captain was there sitting in the office at the time, the Captain that brought the barge over.

Q. Who was that?

A. Captain Alphons Aleman.

And I turned to Captain Aleman and asked him what was the condition of the barge when he dropped it at slip at Texas City.

[fol. 308] And he said that the barge was okeh, that it was slightly down on the head, but that he had examined the rakes, the forward rake, and there was no water in the forward rake, and that in his opinion the barge was okeh, or he wouldn't have left it there; and he thought it was okeh, and he tied it up securely and came up to Houston.

Q. Did you repeat that conversation to Mrs. Weirtenberger?

A. I did.

Q. Did you give Mrs. Weirtenberger any advice as to that barge?

A. She seemed to think the barge was in very bad shape, and I told her, if I recall, after the conversation with the Captain, that I didn't see any immediate danger to the barge, and I suggested that she begin discharging the barge right away.

Q. What did she reply?

A. She said that Mr. Frieler was out of the city and that she had received instructions from Mr. Frieler not to discharge the barge until he came back or Mr. Wynne came down and examined the barge.

Q. Did you ive her any other advice?

A. I told her to watch the barge, and my suggestion, of course, was to get the stuff out of the barge as quickly as possible. In her mind, and she was looking at the barge and there was not, if it was in bad shape, I told her there wasn't but one thing to do, that was to unload it.

Q. Did she tell you in that conversation whether she was up on the deck of the barge, on one corner?

[fol. 309] A. No, sir, she didn't.

Q. Did you have any more conversations with her that day?

A. Not that day. She called me the following day. It was Sunday, sometime after noon. At that time she seemed real excited. She said the barge was in bad shape.

I asked her had she got hold of Mr. Frieler and had he made any arrangements about discharge.

And she gave me the same answer, that she had instructions from Mr. Frieler not to discharge the cargo until Mr. Wynne came down there, and she had not been able to get hold of Mr. Wynne.

And I said: "If you are not going to unload it, and it is in bad shape, you had better get some pumps and pump the water out of it."

She didn't seem to know about how to go about doing that.

So I called, I believe Munez Construction Company and arranged for all the pump he could possibly get to pump it out.

Q. Did she tell you in that second conversation that the water was on the deck of the barge?

A. I don't believe she mentioned that. She said the barge was in bad shape and looked like it was sinking right away. That is what she said. She said it looked like it was sinking.

And I said: "It certainly looks like to me you have had 24 hours and you could get busy and unload it", or some-

thing to that effect. I told her if she couldn't unload, she could get some pumps and pump the water out of the rake or wherever the water was.

[fol. 310] Q. Do you have any recollection of having any conversation with her relative to the insurance angle?

A. Of course, she mentioned that it would be an insurance deal and that Mr. Wynne was supposed to handle those matters for Frieler or for the company.

Q. Do you recall whether or not you had any conversation with her wherein you told her anything about a house burning down?

A. Yes. I just used that expression. She said that it was an insurance matter and that Mr. Wynne would have to look at it.

And I then said: "If it is an insurance matter, if your house is on fire, you certainly wouldn't wait for the insurance people to come out there. You try to put the fire out, of course."

I think I used that expression or that term.

Q. Now, was it following the second conversation on Sunday that you contacted Munez Construction Company?

A. Yes, sir.

Q. If she had told you there was water on the deck of the barge on the twenty-third, Saturday, would you have done anything?

A. Yes, all by myself.

Q. What would you have done?

A. I would have contacted Munez or anybody else I could get to get pumps there. She said she was not going to unload it. If she had unloaded it, it probably wouldn't have happened.

Q. At the time you were talking to her on Saturday and [fol. 311] again on Sunday, either time, did you know that this barge had sprung a leak at Reserve, Louisiana, before it left?

A. No, sir.

Q. Did you know anything about the physical condition of the barge?

A. Nothing whatsoever.

Q. Had you ever seen the barge?

A. Never.

Mr. Lemle: I tender the witness.

Cross-examination.

By Mr. Grace:

Q. Mr. Stovall, I understand that Miss Weirtenberger called you and told you the barge was in bad condition?

A. Well, she indicated that it was down by the head, and she thought it was in bad condition, yes.

Q. If the barge was down at the head, wouldn't that indicate to you it was in bad condition?

A. Not necessarily.

Q. If you knew it was very low down at the head, it would?

A. If water was coming on deck, it sure would.

Q. Did you ask her how much it was down by the head?

A. I asked her whether the water was over the deck, and she said, no.

Q. Didn't she tell you at that time it was at least level with the water?

A. No.

Q. You appreciated it was your responsibility, if it was [fol. 312] low at the head when delivered, to remedy the situation, didn't you?

Mr. Lemle: I object to that. There is no obligation for him to do that.

Q. In the second conversation, or after the second conversation, you took immediate means to relieve the situation by getting pumps?

A. Yes, sir.

Q. Why didn't you do that after the first conversation?

A. Because the Captain said there was no water in the rake. There wouldn't have been anything to pump.

Q. How long would it have taken to have gone to Texas City and seen it?

A. It wouldn't have taken very long.

Q. How long?

A. Probably it would have taken me a couple of hours. But Mr. Hinkle, my superior, was out at the time and I

couldn't leave the office because I was busy dispatching boats.

Q. But the Captain didn't tell you it was low down, is that right?

A. He said it was down by the head. He didn't say it was low down.

Q. Did he tell you how far?

A. I said: "How far down?"

And he said: "The bottom of the head log is just below the water."

Q. He told you there was no water in the dry rake forward?

[fol. 313] A. Yes, sir. I said: "Did you check the rake?"

And he said: "Yes, sir, I did, and there was no water in it."

Q. Did he tell you that was the same condition the barge was in when it left Port Arthur?

A. He did. He said he looked in the rake, and he thought it was the way the barge was loaded. Sometimes they are loaded that way.

Q. He emphasized it was down at the head when he picked it up at Port Arthur?

A. Yes, sir. It was on an even keel.

Q. How soon did he get to Texas City?

A. That was the following day. I don't remember exactly when they got there.

Q. It was on the second day?

A. That was the following day.

Q. You said the barge arrived after midnight, and the first time she called you——

A. The barge got in there apparently after midnight Friday, and she called me Saturday morning.

Q. That was about 10:00?

A. No, she called me before ten. Between 8:30 and 9:00.

Mr. Grace: That is all.

Redirect examination.

By Mr. Lemle:

Q. Mr. Stovall, in sending Munez down there, why did you tell Munez?

[fol. 314] A. He was the only one mentioned that I figured had a pump. In fact, after I talked to the young lady Sunday, I called Mr. Delenge, who is our assistant manager in New Orleans, and told him about it, and he told me to call Munez Construction Company or anybody else in the vicinity of Texas City or Galveston that had a pump and to offer any assistance possible. We would do that on any barge, regardless of what our commitments were of anything.

Q. Do you know who paid Munez?

A. No, sir.

Q. Do you know if River Terminals paid Munez?

A. I don't know.

Mr. Lemle: Okeh.

Mr. Grace: Okeh. That is all.

The State of Texas
County of Harris

I, Hall Etter, Court Reporter U.S. District Court, Southern District of Texas, and a Notary Public in and for Harris County, Texas, hereby certify that the facts stated in the caption to the foregoing deposition are true; that at the time and place named R. L. Wynne, H. B. Lamdin and J. M. Stovall, the witnesses, personally appeared before me and, after having been first duly sworn, was examined by the proctors appearing for the respective parties hereto; that their testimony was taken down by me in shorthand, re-[fol. 315] duced to typewriting under my direction, and that the foregoing deposition constitutes a true and correct transcript of the testimony of said witness at said time.

Given under my hand and seal of office this twenty-eighth day of June, 1951.

s/ Hall Etter, Notary Public, Harris County, Texas.

Testimony of Alphonse Allemand

[Number and title omitted] [Filed: May 15, 1956]

Testimony of Alphonse Allemand, taken on behalf of Respondent, by consent, in the offices of Lemle & Kelleher,

Attorneys-at-Law, National Bank of Commerce Building, New Orleans, Louisiana, beginning at 10:00 o'clock a.m., Saturday, June 14, 1952.

Appearances:

For the Libellant:

John D., M. A. & Edwin H. Grace, Attorneys-at-Law, Baronne Building, New Orleans, Louisiana. By: Edwin H. Grace, Proctor.

For the Respondent:

Lemle & Kelleher, Attorneys-at-Law, National Bank of Commerce Building, New Orleans, Louisiana. By: Selim B. Lemle, Proctor.

Stipulation

It is stipulated and agreed by and between the parties that the testimony of the witness, Alphonse Allemand, is taken by consent, on behalf of Respondent, in the offices of Lemle & Kelleher, Attorneys-at-Law, National Bank of [fol. 316] Commerce Building, New Orleans, Louisiana, beginning at 10:00 o'clock a.m., Saturday, June 14, 1952.

It is further stipulated that the testimony of the witness may be taken down in Shorthand (Stenotype) by Helen R. Dietrich, and by her transcribed, one copy to be furnished opposing counsel without cost to him, the cost of taking the testimony and transcribing same to be a taxable disbursement.

It is further stipulated and agreed that all formalities, including signing, sealing, certification and filing, are waived, and that all objections, save objections to the form of a question, are reserved to the trial of the cause.

ALPHONSE ALLEMAND: a witness called by and on behalf of the Respondent, being first duly sworn, by Harry V. Souchon Notary Public in and for the Parish of Orleans, State of Louisiana, was examined and testified as follows:

Direct examination.

By Mr. Lemle:

Q. Captain, tell us your name.
A. Alphonse Philip Allemand.
Q. And your occupation?
A. Tugboat captain.
Q. How long have you been tugboating, Captain?
A. For about the last thirteen to fourteen years.
Q. For whom are you working now?
A. Coyle Lines.
Q. How long have you been working for Coyle Lines?
A. About seven and a half years.
Q. Before that who did you work for?
[fol. 317] A. For R.T.C.
Q. That is River Terminals Corporation?
A. Yes, sir.
Q. How long did you work for them?
A. About two and a half years.
Q. Before that?
A. Before that I worked for Harry Allsman.
Q. Have you always been tugboat captain with them?
A. No, sir. I have been tugboat captain about the last eight or nine years.
Q. Before that you served your apprenticeship, I suppose?
A. That is right. I was pilot and engineer—just anything.
Q. What tug are you the master of now?
A. Well, the last one I came in, I was master on the A. H. DEBARDELEBEN.
Q. Where have you been running most of your time?
A. From Corpus Christi to Carrabelle, Florida.
Q. That is Corpus Christi, Texas to Carrabelle, Florida?
A. Yes.

Q. Inside or outside?

A. Inland Waterway.

Q. Did you ever tow—did you ever see the Barge PETER B.?

A. Yes, I have towed the Barge PETER B. while I was working for the R.T.C., several times.

Q. Were you ever master of the Tug, DOTTIE D.?

A. Yes, sir, I was master of the Tug DOTTIE D.

Q. Who was she owned and operated by?

A. Owned by R.T.C.

[fol. 318] Q. Do you recall a trip on which you towed the Barge PETER B. and the PETER B. sank after the end of the trip?

A. Yes, sir. I exchanged tow with the Tug SAMBO, which was owned by R.T.C., on September 22, 1944, at 10:15 A.M. I delivered the Tug SAMBO four loaded oil barges. I picked up the Barge PETER B. off the Tug SAMBO.

Q. Where was this?

A. At Port Arthur.

Q. Port Arthur, Texas?

A. Port Arthur, Texas.

Q. Do you remember what time of day you picked her up?

A. About 10:15 A.M., in the morning.

Q. Where were you to take that barge to?

A. I was headed for Texas City with the barge.

Q. Where did you get your orders from to take her to Texas City?

A. From the Houston office.

Q. How?

A. By radio.

Q. Where were you when you got the orders?

A. I would say about ten miles west of Port Arthur.

Q. What was the condition of the Barge PETER B. when you picked her up as to draft?

A. When I picked up the Barge PETER B. off the Tug SAMBO, she had a list of about a foot or a foot and a half on the bow. In other words, the bow was about a foot and a half lower than the stern of the barge.

Q. Did you make any inquiry of the Tug SAMBO as to [fol. 319] how she got that way?

A. I asked if he knew anything about the barge having any water in it or anything else, and he said he didn't know, so I sent Mr. Theriot, John Theriot, who was pilot aboard the DOTTIE D. with me at the time—I had him to check both rakes of the barge to see if she had any water in it, and Mr. Theriot came back and told me that the barge was dry—didn't have any water in either rake. So I didn't take Mr. Theriot's word for it—I thought it was my duty to go check it myself, so I went over and checked the barge myself, and there was no water in the barge.

Q. Did you open any of the cargo compartments?

A. No, sir, I couldn't open that, because on account I figured that maybe I didn't have any business to look in the cargo.

Q. Are you satisfied personally there wasn't any water in either rake of the barge?

A. Yes, sir.

Q. Were the rakes dry or was anything else in them?

A. They was dry—didn't have anything else in the rakes.

Q. Did you know or had anybody told you that the barge had a hole in her?

A. I didn't know anything about it. Nobody never mentioned anything about it to me.

Q. Did you have on the Tug DOTTIE D. pumps or other equipment sufficient to have pumped out water, if there were water or anything else in the rakes?

A. Yes, sir. We had a gasoline pump aboard the boat at [fol. 320] all times for that purpose.

Q. Was the pump sufficient to transfer cargo, if necessary to transfer cargo?

A. No, sir.

Q. Did you pump molasses with that pump?

A. No, sir.

Q. Did you have any pump on board that would pump molasses?

A. No.

Q. What did you do then?

A. When I noticed the barge had a list, I thought that I would turn the barge around and make up—shove the barge

stern-first to be able to proceed and make better time by having the stern higher—I mean shoving the high end first, you see.

Q. Does that barge have—is that barge raked at both ends?

A. Yes, sir, (sic) both ends was raked about the same.

Q. Where did you take the barge?

A. To Texas City at the Pier "O".

Q. Do you remember what time it was when you got there?

A. We got there some time during the night, but I don't recall exactly the time.

Q. That is the night of the same day you took her in tow?

A. That is right.

Q. How far did you have to tow her?

A. Oh, I'd say about 65, 60 to 65 miles.

Q. Sixty-five miles—and what would it take you to tow her 65 miles?

A. We would make about 7 miles an hour with the barge. [fol. 321] Q. But you do know you got there the same night you took her in tow?

A. Yes, sir.

Q. And what did you do with her?

A. When I got to Texas City, I asked the watchman where he wanted the barge, and he showed me where to tie it up at Pier "O".

Q. Did you tie it up at Pier "O"?

A. Yes, sir.

Q. At any time after you took the barge in tow, did you check the rakes of that barge again to see whether or not she was leaking in the rakes?

A. Yes, sir, about an hour to an hour and a half before arriving at Texas City I went and checked both rakes to see if she had went down any since we picked it up. The rakes were still dry and the barge had just about the same draft as when I picked it up.

Q. What would you say was the difference in draft between stem and stern?

A. I'd say about a foot and a half.

Q. What was her freeboard on the stern, if you can remember?

A. The high end was about two feet or maybe two feet and a few inches freeboard, the high end.

Q. What was the low end?

A. The low end was about, I would say, a foot or maybe 9 inches, from 9 inches to a foot freeboard on the lower end.

Q. When you tied that barge up and left her, was any water on deck?

[fol. 322] A. No, sir.

Q. Did you hear afterwards that the barge had sunk?

A. Yes, sir. I heard it from the Houston Office a few days afterwards.

Q. Did you ever see the barge again?

A. No, sir.

Mr. Lemle: I tender the witness.

Cross examination.

By Mr. Grace:

Q. Captain, you say previous to this occasion you had towed the barge before?

A. Yes, sir.

Q. Where had you towed it?

A. We had picked it up in Gretna here and already have brought it to Texas City.

Q. Was it loaded or light?

A. Loaded. And I have towed it also empty.

Q. And you had towed it and didn't push her?

A. No, sir, I have towed it with other barges.

Q. I mean on previous occasions you had towed it from the stern of the tug?

A. Yes, sir.

Q. You always towed that way?

A. Yes, sir, before this time, yes, sir.

Q. Did you ever have any trouble with it?

A. No, sir.

Q. Now on this particular occasion when you met this

[fol. 323] barge at Port Arthur, you say you saw it low at the head?

A. Yes, sir.

Q. Only had about 9 inches to one foot freeboard?

A. On one side, yes, sir.

Q. How much on the other side?

A. Well, the other side was just a little higher. I would say three or four inches higher.

Q. And how much freeboard in the rear?

A. You mean how much on the high end, on the stern?

Q. Yes.

A. I would say about two to two feet and three or four inches.

Q. And you decided to push the barge instead of tow it?

A. Well, it was the only way we could handle it.

Q. Well, how did the captain of the SAMBO handle it—the same way?

A. No, sir. I think he had that barge with other barges in tow towing on a hawser.

Q. Why couldn't you tow it on a hawser?

A. Because we don't tow one barge on a hawser; we always shove them.

Q. In the Intracoastal Canal you always push them?

A. Yes, sir.

Q. How far distant is it across Galveston Bay?

A. You mean the bay itself?

Q. Yes.

A. I'd say about 19 miles from the mouth of the canal towards Houston.

Q. And you pushed it across the bay?

[fol. 324] A. No, sir. I pushed it to Texas City.

Q. Where did you start pushing it?

A. From Port Arthur.

Q. Well, let's get this straight. Where did you meet the tug or barge?

A. The Tug SAMBO in Port Arthur.

Q. Then you were towing it on a hawser from there?

A. No, sir, shoved it at all times.

Q. You shoved it at all times, did you?

A. Yes, sir.

Q. And you pushed at a speed of about 7 miles an hour?
A. About.
Q. Now you say you personally examined the rake compartment, the front?
A. And the stern also, both.
Q. How did you examine it?
A. Well, I just picked up the hatch, unscrewed the hatch and looked in.
Q. Did you have any trouble unscrewing the hatch?
A. They was kind of hard, but I managed to unscrew them.
Q. Did you unscrew them with your hands?
A. Yes.
Q. And you didn't find any water in it?
A. There wasn't any water in it.
Q. On the previous occasion when you towed this barge, was the bow end low the same way as on this occasion?
A. No, sir. Before that when I have towed the Barge PETER B., she was loaded level.
[fol. 325] Q. This is the first time you saw it where you had less draft in front than in the stern?
A. That is right.
Q. What reason did you figure it would be lower at the front than the stern when you had never seen it that way before?
A. Well, I had never saw it before, and I didn't have any idea what it could have been.
Q. You thought it may have been water and that is why you examined it?
A. That is why I examined the barge, because I thought maybe it had water in the rake.
Q. Well, that would make it lower in the front, wouldn't it?
A. Yes, sir, if it had had enough to amount to anything.
Q. Did you make up any log for this trip?
A. Yes, sir.

Mr. Grace: Do you have the log?

(Whereupon, counsel for respondent produced a document.)

Q. Captain, is this the way you make the logs up or is this a copy of your log?

A. Well, that has been a long while back. I don't remember exactly now. They make logs altogether different than we do now.

Mr. Lemle: That document was in my file as the log. Whether it is the original or a copy, I don't know.

Mr. Grace: Did he make that up originally?

[fol. 326] Mr. Lemle: I don't know who made it. That is all I have.

The Witness: We used to write our log, if I remember correctly, by pencil. We didn't type any. In fact, we couldn't type it.

Mr. Lemle: Do you know where your original log is?

The Witness: Well, they sold the boat. That I wouldn't know. I wouldn't know if the log went with the boat. That was the master's log and it probably went with the boat. If we changed tow with another, we would show approximately the mileage, the time, and whatever tow we delivered to him or picked up from him.

Mr. Lemle: In reply to the call of counsel, I hand him a document taken from my file, which purports to be the log of the River Terminals Corporation for September 22, 1944. It does not appear to be the original. I do not know who made that copy or when or where. It has been in my file since 1944.

Mr. Grace: In reply, I ask that the original log be produced. The Captain testified that he made the entries in pencil, handwriting, and this log copy which has been presented to me was not made by him. I, therefore, ask for the original as made by the Captain to be produced.

Q. In making up your entries of your log, would you have made an entry about testing the rake compartments?

[fol. 327] A. No, I don't recall putting that on the log.

Q. Would you make an entry with respect to the fact that the barge was low in front, in the bow?

A. I have let the office know about that.

Q. But you didn't make any entry in the log on that?

A. I may or may not. That I can't swear, that I did or I did not. I don't remember if I did or not. That has been quite a few years back, and I don't recall that far.

Q. Isn't that important?

A. Sir?

Q. Don't you consider that important, to make entries respecting the condition of the vessel?

A. I think it is. That is why I probably made it, if it was. Could I say something?

Q. Yes.

A. I remember now Mr. John Theriot used to do a lot of typing. We did have a typewriter on the boat, on each R.T.C. boat they furnished a typewriter, but myself I couldn't type. I can't hardly type my name on that. I would have to take an hour. But Mr. John Theriot, my pilot, usually typed quite a bit for me, because some time we would have to turn in a requisition to order some stuff, outside stuff, and he would type it for me. He may have typed that. That I don't remember.

Q. Captain, I ask you to look at these entries and see if you see an entry with respect to your checking the compartments of the barge to determine whether there water (sic) in them.

A. (Referring to document) It don't say anything on here about the barge having a list of any kind, but we used [fol. 328] to make one of these every day.

Q. But there is nothing on those two sheets of paper to indicate that you checked the compartments of the barge to determine whether there was water in them. Is that correct?

A. I haven't read this one. Just a minute. No, sir.

Q. There is no entry that shows you made any check of the compartments of the barge?

A. No, I haven't made that. If I did on any other, that I don't remember.

Q. Now, Captain, when you brought the barge to Texas City, you say it was very low in the bow?

A. That is right. The bow was lower than the stern.

Q. It only had about 9 inches to one foot freeboard?

A. On the bow, on the lower end of the bow.

Q. Did you think that was a dangerous condition?

A. Well, we have towed it that far and it hadn't went down any more since we have picked it up, and usually they unload those barges—started unloading those barges just

right away, so I figured that the barge was safe, if they was going to unload the barge.

Q. If they had unloaded it right away?

A. Yes.

Q. You arrived there at night?

A. Yes, sir.

Q. You knew they couldn't unload at that time?

A. I wasn't supposed to know that. We was in war and I was working at night and I thought maybe other people could work at night too.

[fol. 329] Q. Who did you see there at Texas City?

A. I saw the watchman.

Q. Did he give you his name?

A. No, sir.

Q. Did you tell him that the barge was low in the bow?

A. He asked me what was the matter with the barge, and I told him I didn't know anything about the barge other than that I have checked both rakes and they didn't have any water in either rake of the barge.

Q. So you say you checked the rakes again at Texas City?

A. Yes, sir, just before arriving there.

Q. Did you have any trouble opening the manhole?

A. Not too much.

Q. Did you open the manhole before, on other occasions before, of this barge?

A. Not this particular barge, no.

Q. You don't know anything about the time of night that you arrived at Texas City?

A. Well, I think it was pretty close to midnight, if I remember correctly, that we arrived in Texas City.

Q. And you were told a couple of days later that the barge had sunk?

A. That is right.

Q. Did you make any report to the River Terminals Corporation?

A. Yes, sir, we have an accident report.

Mr. Grace: That is all.

[fol. 330] Redirect examination.

By Mr. Lemle:

Q. You said you made a report to the River Terminals Corporation?

A. Yes, sir, we must have made an accident report, because——

Q. Have you got a copy of that report that you made, the statement that you made?

A. Yes, sir, I believe I have. (producing document). This is just a copy of the statement I made, but we make an accident report and they keep that over there in the office—they are supposed to anyhow—and we generally keep a copy on the vessel.

Q. Would you make an accident report on a trip on which you left a barge which didn't have anything occur to the barge while it was in your possession?

A. Well, sir, if we have any collision with another vessel or if we have something like that to happen, then they want us to make an accident report.

Q. Did you have any accident with this barge while you had her?

A. No, sir.

Q. Would you make a report under those circumstances?

A. Well, the office required that.

Q. The office requires you to make a report of an accident when you don't have one?

A. I don't know whether you call it an accident, but in my language I call it an accident report—I don't know what you would call it—in other words, we make a report that we tied the barge up safely, that the barge—like I [fol. 331] say, I checked it and all, and the barge didn't have any water in it, and I turn that in to the office, and from then on I don't know what they do with it.

Q. I show you the statement you handed me. Is that your signature?

A. Yes, sir.

Q. It says it was made at Harvey, Louisiana, on September 29, 1944. Do you know whether you made it then?

A. Well, that is a——

Q. It is there in the lower left hand corner.

A. Yes, sir.

Mr. Lemle: In connection with the witness' testimony, I offer that statement in evidence and ask that it be marked "Allemand 1" for identification.

Mr. Grace: I object to the offer as being a statement made by the master considerably after the sinking of the barge and as a declaration in favor of the respondent.

Mr. Lemle: Counsel has asked for a log book, at a time when I am unable to produce the log book by lapse of time and I don't even know the whereabouts of the barge, and I submit that the statement, which was made six days after the barge was delivered, is just as efficacious as to what happened as would be the log book if it could be produced.

Mr. Grace: To counsel's statement I enter a further [fol. 332] objection on the ground that this is a typed statement not made by the captain, as the log originally was made in his own handwriting, and he didn't type it. Did you type this?

The Witness: That I don't remember. As far as myself, I didn't type it myself, because I can't type. Maybe I might have got Mr. Theriot or someone to type it for me.

Mr. Grace: On the grounds that it is not typed by the witness and it is a self-serving declaration.

Q. Captain, at the time you made this statement, state whether or not the facts it contained were fresh in your mind.

A. Well, it may or may not be. There are a lot of things that I don't remember exactly what happened 9 years ago or 8 years ago, whatever amount of time it was.

Q. Well, this was made on September 29, 1944, which was 7 days after you delivered the barge. At that time did you remember the facts that were in the statement?

A. I didn't get you.

Q. This statement was made seven days after you delivered this barge, seven days later, and I ask you if at that time, on September 29, 1944, seven days after you delivered the barge you remembered what you did.

A. If I remember correctly, Mr. Theriot and I came over across the river and made a statement, if I remember exactly.

Q. Well, this statement says it was made at Harvey, Louisiana. Do you remember whether you gave a state-
[fol. 333] ment at Harvey, Louisiana, or not?

A. Yes, sir, we used to give a statement—we gave a statement to Captain Jack Dennis, the Port Captain, but he was Port Captain at that time for River Terminals Corporation, and he would want to know when we had come in what really happened, and we would tell him, he would question us, and we would tell them what we knew, and I remember him having a secretary to do some typing.

Q. Well, now, coming back to this so-called master's log, what was your practice in keeping that Log? When it was written up, how many copies did you write up and what did you do with them?

A. Well, we would turn in a copy to the office and we would keep a master's log on the vessel.

Q. Are you able to say whether or not this is the copy that you turned in to the office?

A. Well, it could be. Yes, sir, it could be, because John Theriot used to do some typing for me and I would sign it, whatever he typed for me I would sign it, if it was right.

Mr. Lemle: In connection with the witness' testimony, I offer the copy of the log which has been produced, and ask that it be marked for identification "Allemand 2".

Mr. Grace: To which offer I object on the ground that it is not the original at all as made up by the master, in accordance with his testimony.

[fol. 334] Q. Captain, you came out in Galveston Bay where?

A. Bolivar, into the Bay.

Q. And you laid a course across the Bay in what direction, to the mouth of the Texas City Channel, which is on the west side?

A. We have buoys to run from. We don't have to run any course. I don't recall the course, because we don't pay no attention, because of having small buoys, which mark the channel.

Q. How far is it across from where you come out at Bolivar to where you go inside again in the Texas City Channel?

A. I'd say about six to seven miles.

Q. You gave Mr. Grace a different distance a while ago. What distance was that you gave him?

A. I thought he was talking about from Bolivar to Houston, to Morgan's Point, which is the end of Galveston Bay. That is going towards Houston.—I was always told that the Bay was about 19 miles wide, crossing, what I mean, from Galveston—from Bolivar to Houston.

Q. All right. Now you crossed from Bolivar to the Texas City channel?

A. Yes, sir.

Q. And that is about how far?

A. I would say about six to seven miles.

Q. Did you have any trouble towing the barge on this occasion?

A. No, sir. It was smooth, the bay was smooth.

Q. Did you ever have any water on deck?

[fol. 335] A. No, sir.

Q. Can you state whether or not when you left the barge whether you replaced these manhole covers?

A. I sure did.

Recross examination.

By Mr. Grace:

Q. Captain, how did you make up your tug to the barge to push?

A. We had two wires leading from the forward quarter bitt to the after bitt of the barge with some steamboat hatchets. (sic)

Q. Did you ever push any barges across the bay before?

A. Yes, sir, several of them.

Q. But that is not the customary manner you generally use? You generally tow them on the stern on a hawser?

A. If we have more than one.

Q. If you have only one, you always push it across the bay?

A. Yes, sir, unless it is really too rough that we couldn't

handle it on ratchets, and then we don't go across—we stay in the canal.

Q. So you would have pushed this barge across whether it was low in the bow or not?

A. If the bay was calm, yes, sir.

Q. So it didn't make any difference that the barge was low at the bow as a reason that you pushed it across instead of towing it on a hawser at the stern?

A. I don't get you.

Q. In other words, when you went to pick up this barge and there was only one barge, you intended to push it [fol. 336] across the bay. Is that right?

A. Yes, sir.

Q. So it didn't make any difference that the barge was low in the bow as a reason that you pushed it across?

A. Well, it didn't make any difference as long as the bay was calm. If it wasn't rough, it wouldn't interfere whether you shove it in the canal or in the bay—it's all the same water.

Q. I say: you would have pushed it irrespective of whether it was low or not?

A. If the bay was calm, yes, sir.

Q. You say the bay was calm?

A. Yes, sir, it was.

Q. No wind blowing?

A. Very, very litt.e (sic)

Q. About how much wind would you say?

A. That I don't remember, but I know the bay was calm. It wasn't rough.

Q. You couldn't give the velocity of the wind approximately?

A. Well, I would say maybe five to six miles an hour.

Q. Any waves?

A. No, no waves.

Q. No waves at all?

A. Everything was just as smooth as this over here (indicating the floor).

Q. And you say you didn't see any water coming over the deck of the barge?

[fol. 337] A. Never was any water to come over the barge.

Q. At no time?
A. At no time.

Mr. Graee: That is all.
Mr. Lemle: That is all. Thank you, Captain.

Thereupon, at 10:55 o'clock a.m., the taking of the witness' testimony was concluded.

CERTIFICATE OF STENOGRAPHER

I, Helen R. Dietrich, certify that the above and foregoing is, to the best of my knowledge, information and belief, a true and correct transcription of the testimony of Alphonse Allemand, taken by consent, on behalf of Respondent, in the offices of Lemle & Kelleher, Attorneys-at-Law, National Bank of Commerce Bldg., New Orleans, La., beginning at 10:00 o'clock a.m., Saturday, June 14, 1952, to be used in the above entitled matter now pending in the United States District Court, Eastern District of Louisiana, New Orleans Division.

s/ Helen R. Dietrich, Reporter.

EXHIBIT "ALLEMAND 1"

STATEMENT OF ALPHONSE ALLEMAND, MASTER OF TUG DOTTIE DEE, SEPTEMBER 22, 1944

I was Captain of the tug DOTTIE DEE on September 22, 1944, when we exchanged tows with tug SAMBO at Port Arthur at 10:15 A.M. We delivered to the SAMBO four [fol. 338] loaded oil barges and received from them only one loaded barge, the PETER B, containing molasses.

We picked up the PETER B, and, noting that the bow headlog was about one and one-half feet lower in the water than the stern, I had Pilot Theriot inspect both rakes of the barge and he said they were dry. I, myself, also got on the barge and looked in the rakes and found no water whatever and assumed the reason that the barge was down on the head was because she was loaded heavier on one end than the other. For easy pushing, we made up to the bow headlog and pushed the barge stern first into Texas City

and tied it up at Pier "O". We again checked both buoyancy compartments and found them dry just about two hours before arriving Texas City.

When we tied up the barge at Pier "O", the dock watchman asked if the barge was leaking and we told him that it was not, that it was in that same condition when we picked it up and that the rake tanks were dry.

s/ Alphonse Allemand
Alphonse Allemand

Harvey, Louisiana
September 29, 1944.

NOTE: EXHIBIT ALLEMAND 2 OMITTED, BEING SENT TO COURT OF APPEALS IN ORIGINAL FORM

[fol. 339]

Testimony of John S. Hinkle

[Number and title omitted]. [Filed: May 15, 1956]

Testimony of John S. Hinkle, taken on behalf of Respondent, in the offices of Lemle & Kelleher, Attorneys-at-Law, 18th Floor, National Bank of Commerce Building, New Orleans, Louisiana, beginning at 2:00 o'clock p.m., Monday, June 11, 1951.

APPEARANCES:

For the Libellant:

John D., M. A. & Edwin H. Grace, Attorneys-at-Law, Baronne Building, New Orleans, Louisiana. By: Edwin H. Grace, Esq.

For the Respondent:

Lemle & Kelleher, Attorneys-at-Law, National Bank of Commerce Bldg., New Orleans, Louisiana. By: Selim B. Lemle, Esq.

Stipulation

It is stipulated and agreed by and between the parties that the testimony of the witness, John S. Hinkle, is taken

by consent, on behalf of Respondent, in the offices of Lemle & Kelleher, Attorneys-at-Law, National Bank of Commerce Building, New Orleans, Louisiana, beginning at 2:00 o'clock P.M., Monday, June 11, 1951.

It is further stipulated that the ttstimony (sic) of the witness may be taken down in shorthand (Stenotype) by Helen R. Dietrich, and by her transcribed, one copy to be furnished opposing counsel without cost to him, the cost of taking the testimony and transcribing same to be a taxable disbursement.

[fol. 340] It is further stipulated and agreed that all formalities including signing, sealing, certification and filing, are waived, and that all objections, save objections to the form of a question, are reserved to the trial of the cause.

JOHN S. HINKLE: a witness called by and on behalf of the Respondent, being first duly sworn by Harry V. Souchon, Notary Public in and for the Parish of Orleans, State of Louisiana, was examined and testified as follows:

Direct examination.

By Mr. Lemle:

Q. Mr. Hinkle, will you please give us your name, age, residence and occupation.

A. John S. Hinkle, 5911 St. Augustine, Houston, Texas; present occupation: Vice President, Traffic, Dixie Carriers, Inc., 906 Cotton Exchange Building, Houston, Texas.

Q. Your age?

A. Forty-one.

Q. Mr. Hinkle, were you ever employed by River Terminals Corp?

A. I was.

Q. Will you tell us whether or not you were employed by River Terminals Corp. in September of 1944.

A. I was.

Q. And how long did you remain with River Terminals Corp?

A. Eight years.

Q. Until they went out of business?

A. Yes; from 1940 until 1948.

Q. And what was your occupation, your position, with [fol. 341] them in September of 1944?

A. General Agent, Houston.

Q. Mr. Hinkle, we are investigating the sinking of the Barge, PETER B., in September of 1944. Do you recall that incident?

A. Yes.

Q. Do you remember when it happened?

A. Not the exact date, no.

Q. Will you tell us whether or not at any time prior to the sinking of that barge you had any conversation with Mr. Frieler of Southwestern Sugar & Molasses Company?

A. Yes, sir, I had a conversation with Mr. Frieler. He came to my office—I don't recall the exact date, but the conversation that ensued was that he told me that the barge was at that time enroute to Houston under load; and while loading at Reserve that the barge had sprung a leak in one of the cargo tanks, and he asked me to determine whether or not while the barge was in possession of River Terminals it had been in any kind of an accident. I told him that I would. I made such an investigation and found out that while the barge was in our possession it had not become involved in any accident whatsoever.

Q. Where were you when you had that conversation with Mr. Frieler?

A. In my office at Houston.

Q. Did Mr. Frieler ask you anything else or ask you to do anything else?

[fol. 342] A. No. As I said, he asked me to determine if the barge had been in any accident while in our possession, and would I please make an investigation to determine that, which, as I stated, I did, and it had not been.

Q. Did you communicate that information to Mr. Frieler?

A. I don't recall whether I did or not. I am sure that I must have some time later on, because I am sure that he must have needed it for some kind of purpose.

Mr. Lemle: I tender the witness.

Cross examination.

By Mr. Grace:

Q. Mr. Hinkle, do you remember how soon after when he came to your office in Houston that the tow had left Reserve?

A. No, I do not recall that time, because New Orleans is a focal point or was at that time rather a focal point for our operations, and we never knew, say, 24, 36 or 48 hours after the tow left New Orleans just exactly what was in the tow. We had any number of sources of barges to be incorporated into the regular westbound tows. We didn't know that.

Q. Do you know whether or not he told you when the tow had left with this tow at Reserve?

A. No, sir, he did not tell me when the tow had left Reserve.

Q. Did you make a check on how far the tug had advanced with this barge when he mentioned that to you?

A. No, I did not.

[fol. 343] Q. You don't know whether this barge was at Harvey, Louisiana at the time he was talking with you, do you?

A. No, sir, I don't, because my best recollection was that for the next two or three days I was out of town and the operations were at that time being handled by my assistant, Mr. Stovall.

Q. Well, did you pass that information on that Mr. Frieler gave in respect to the leak in this tank?

A. Not necessarily. I don't recall passing that particular information on. I did tell Mr. Stovall that we were to determine whether the barge had become involved in any accidents, and that Mr. Frieler had told me that the barge, while loading at Reserve, had developed this leak, and the primary thing of importance at that time, I took it from Mr. Frieler's conversation, was to determine whether the barge had become involved in any accident. I assumed he wanted that for his underwriters; I didn't know.

Q. Did you make that statement to Mr. Stovall the same day that Mr. Frieler told you?

A. Concerning the investigation?

A. (sic) No, concerning the leak.

Q. (sic) If I did, I just mentioned it in a casual manner since there didn't seem to be any great concern over that. It seemed to be the possibility of an accident that the barge might have become involved in in our possession much more than any leak that had come about.

Q. You didn't attach much importance to the fact there was a leak when it left Reserve in one of the tanks?

[fol. 344] A. No, I don't attach much significance to a leak in a cargo tank, because that is what the tank is for, to load liquids, and, if water is in a cargo tank or petroleum or molasses or what—why——

Q. It would make no difference?

A. No.

Q. In other words, if it filled up to the extent of the water level with water, it would make no more difference than if it filled up to that extent with molasses?

A. That is true; as long as the bulkheads were tight and the rakes were tight, that is true.

Q. Well, could you have gotten in touch with the master of this tow at the time that Mr. Frieler mentioned that to you?

A. You say could I?

Q. Yes.

A. For what purpose?

Q. Well, could you have gotten in touch with the master?

A. I am not positive at the moment whether that particular tug that handled the movement was equipped with radio or not, sir.

Q. It would have to be by radio?

A. Yes, that is the usual method of communicating.

Q. Well, did you know that it stopped at Harvey for a considerable time?

A. I did not, no, sir.

Q. If he had been at Harvey, you could have gotten in touch with him, even though it did not have radio?

[fol. 345] A. If I had known that the tug was at Harvey, that is true.

Q. You could have?

A. I could have gotten in touch, yes.

Q. You don't remember the date Mr. Frieler called at your office?

A. No, sir, I do not. I don't know how to attempt to recall the date, except that he told me that the barge was enroute from Reserve.

Q. And you understood that was the object of his coming to your office, to give you that information?

A. I understood the object of his visit was for me to determine whether the barge had become involved in any accident while in our possession.

Q. But also to give you information about the leak?

A. Well, yes, I would say that that was part of the reason that he came.

Q. When you told him that the barge had not been in any accident, that information was obtained from reports that you got?

A. That information is always obtained from accident reports turned in by the tugs handling the barges or from the logs of the respective tugs to substantiate any accident reports.

Q. No report had been made to you of any accidents?

A. Definitely not.

Q. That was the information that you gave?

A. Later, yes.

Mr. Grace: That is all.

[fol. 346] Redirect examination.

By Mr. Lemle:

Q. Do you know now, today, any reason why you should have contacted anyone about a leak in a cargo tank in that barge, from your standpoint as an operating man?

A. No, sir. A leak in a cargo tank is not a matter of any concern, because, as I say, that is what the tank is for, for cargo, whether it be molasses or water or kerosene or petroleum products of any kind.

Q. Could you pump out a leaking cargo tank without making the leak tight? To prevent water leaking in?

A. I don't see how that would be possible.

Q. Is there any reason, from your experience, to be concerned about a leak in a cargo tank, if the rake bulkheads are tight?

A. If a barge is tendered to us as being seaworthy and staunch and tight, and all the bulkheads are in that condition, why, I see no reason to be concerned about a small leak in a cargo compartment, sir.

Q. Did you have any reason to believe that this barge was other than tight in her bulkheads and her rake bulkheads?

A. None whatsoever.

Mr. Lemle: That is all.

Recross examination.

By Mr. Grace:

Q. You had towed this barge previous to this particular [fol. 347] occasion, hadn't you?

A. I believe that we had handled the barge on several occasions prior to this particular incident you are speaking of.

Mr. Grace: That is all.
Mr. Lemle: That is all.

Thereupon, at 2:15 o'clock P.M., the taking of the witness' testimony was concuded.

Certificate of Stenographer

I, Helen R. Dietrich, certify that the above and foregoing is, to the best of my knowledge, information, and belief, a true and correct transcription of the testimony of John S. Hinkle, taken on behalf of Respondent, in the offices of Lemle & Kelleher, Attorneys-at-Law, National Bank of Commerce Building, New Orleans, Louisiana, beginning at 2:00 o'clock p.m., Monday, June 11, 1951, to be used in the above entitled matter now pending in the United States District Court, Eastern District of Louisiana, New Orleans Division.

s/ Helen R. Dietrich, Reporter.

[fol. 348]

EXHIBIT LIBELLANT 3

Report No. 1

Reserve, Louisiana.
Sept. 16, 1944.

MOLASSES PUMPED FROM THE RIVER TANK AT RESERVE REFINERY INTO THE BARGE PETER "B", SEPTEMBER 16, 1944.

Opening Gauge	174,203 Gallons.
Closing Gauge	34,045 Gallons
Pumped into Barge	140,158 Gallons

Goschaux Sugars, Inc.
(sgd) W. Bondurant

Southwestern Sugar & Molasses Co.
(sgd) L. H. Frieler

EXHIBIT LIBELLANT 4

Report No. 5

Baton Rouge, La. DAY LETTER 9/17/44

To—A. I. Kaplan
90 Wall Street
New York, N.Y.

BARGE LEFT TODAY WITH 140,158 GALLONS BAUME 43.05 TANK ONE STARBOARD BOW LEAKS WATER THROUGH SIDE PLATE PUMPED 15 to 20 TONS INTO THIS TANK BEFORE LEAK STARTED NOTIFY INSURANCE FOR SURVEY ARRIVING TEXAS CITY BARGE MUST HAVE HIT DAMAGED SUBMERGED FILING ON GODCHAUX PIER.

L. H. FRIELER

COPY

[fol. 349]

EXHIBIT LIBELLANT 5

SOUTHWESTERN SUGAR & MOLASSES COMPANY

Box 171

Texas City, Texas

Report No. 6

To Whom It May Concern:

Monday, Sept. 18th in the morning about 10:00 o'clock, I called on Mr. Hinkle at River Terminal, Houston.

I explained to him that tank No. 2 was leaking and that I was worried about this leak. I gave him all details in regard to location of leak and how many feet the barge was above water.

Mr. Hinkle dictated a letter to his New Orleans office advising them all details. During the conversation, Mr. Hinkle told me that their tugs had pumps and if the barge would be in danger they would pump tank No. 2 out to keep her afloat.

Mr. Hinkle also advised me that the barge would stay for several days in Harvey, New Orleans till tow could be arranged.

Before I left, I asked him to keep me advised of her movements and to call me if she encountered any trouble.

No calls came in up to Sept. 21st; therefore I thought everything was well under control.

.....

L. H. Frieler

[fol. 350]

EXHIBIT RESPONDENT No. 1

SOUTHWESTERN SUGAR & MOLASSES COMPANY

Box 171

Texas City, Texas

Report No. 8

To Whom It May Concern:

On Sept. 21st, I received a wire from Mr. Kaplan to proceed at once to McAllen, Texas.

That morning Captain R. L. Wynne called and advised me that the wanted details in regard to "Peter B". During the conversation, I told him that I had to leave for McAllen about five o'clock in the evening. He told me that he would see me at 4:00 p.m.

Captain R. L. Wynne came to the office informing me that he wanted to see the barge before unloading. We came to an understanding to unload the barge on Monday on my return from McAllen, unless something else would come up.

Capt. Wynne left his telephone number here which I gave to Miss Warda Wertenberger with instructions to call Capt. Wynne on arrival of the barge which she did.

Before leaving for McAllen, I left the following instructions to Warda Wertenberger;

9/21/44

"Don't unload Barge untill two surveyos, one for molasses and one for Barge, has seen damage. If you have their permit you can go ahead and unload."

L. H. Frieler

[fol. 351]

EXHIBIT LIBELLANT 7

THE BOARD OF UNDERWRITERS OF NEW YORK

617 Carone Street Houston, Texas

Sept. 21, 1944

Report No. 9

SOUTHWESTERN SUGAR & MOLASSES COMPANY
TEXAS CITY, TEXAS

ATTN: Mr. Frieler

Gentlemen:

Confirming our telephone conversation of yesterday, please be advised that I wish to attend on board the Barge Peter B prior to that barge being discharged at Texas City. Please give me as much advance notice as possible in order that I may attend without causing you any inconvenience.

Very truly yours,

R. L. Wynne (Signed)
R. L. Wynne

RLW:jg
c o p y

[fol. 352]

EXHIBIT LIBELLANT 11

SOUTHWESTERN SUGAR & MOLASSES COMPANY
Box 171
Texas City, Texas

Report No. 11

September 26, 1944

Mr. A. I. Kaplan
90 Wall Street
New York, N.Y.

Dear Mr. Kaplan:

Attached please find report in regard to the sinking of "Peter B".

As previously reported to you, I advised the River Terminals that the Barge "PETER B" was taking water in Tank No. 2 I asked Mr. Hinkle to advise his New Orleans Office and report to me in regard to her condition on her way from New Orleans to Texas City. No reports were received therefore I believed everything was well under control, and as per your instructions, I left on Wednesday Septembe 21 for McAllen. On the afternoon I left for McAllen, Capt. Wynne called to have an interview with me in regard to the survey. I told him I would wait for him and give him all the details as I intended to leave town that afternoon.

Capt. Wynne and myself came to an understanding that we would not touch the cargo till I returned from McAllen. He wanted me to make the Beaume test on the damaged Tank in order to determine if the molasses would be good enough to put into the shore tanks. I asked him to leave his home and office telephone numbers with us in order to notify him as soon as the Barge arrived.

Capt. Wynne was notified when the Barge arrived, but he did not seem to think that it was necessary to come down to Texas City to inspect the Barge considering that Mr. Stovall had told Miss Wertenberger that it was absurd to think that the Barge would sink.

Please advise us what kind of affidavit you need in order that we get started on this Barge loss.

Sincerely yours,

SOUTHWESTERN SUGAR & MOLASSES COMPANY

By

LHF:OG
Encls.

Copy.

[fol. 353]

EXHIBIT LIBELLANT 23

STATEMENT OF JOHN THERIOR, PILOT OF THE M/V DOTTIE DEE, WHICH HANDLED BARGE PETER B FROM PORT ARTHUR, TEXAS TO TEXAS CITY, TEXAS.

I was pilot of tug DOTTIE DEE which exchanged tows with tug SAMBO at Port Arthur, Texas, at 10:15 A.M., Septembber 22, 1944. The bargê PETER B was our only barge from Port Arthur into Texas City and we handled it made up on the head and pushed it into Texas City.

When we received the barge from Tug SAMBO, the barge had only about three inches freeboard at the bow headlog but about eighteen inches freeboard at the stern headlog. We examined both rake compartments for water, however, found them entirely dry and presumed that the barge was down a bit on the head due to loading, also due to the fact that it has an empty compartment aft for pump machinery. To facilitate handling, we made up on the bow of the barge and pushed it backward into Texas City.

We tied up the barge at Texas City Saturday, September 23, 12:01 A.M., tying it securely to the dock, and the barge was exactly in the same condition as to trim as it was when we first picked it up.

In our handling of the barge from Port Arthur to Texas City our trip was without incident and we were involved in no collision of any sort. To the best of my knowledge, the barge was water-tight and seaworthy for no damage could be noted at the time we first looked in the rake compartments for water.

(sgd) John Theriot
John Theriot

Harvey, Louisiana
September 27, 1944

[fol. 354]

EXHIBIT WYNNE 2

COPY

January 6, 1948

Messrs. John D., M. A. & Edwin H. Grace
Baronne Buidling
New Orleans 12, La.

Attn: Mr. M. A. Grace

Dear Sir:

In reply to your letter of December 30th, please be advised as follows:

I am of the opinion that it would have been possible for the crew of the tug to have opened these manholes, as the lugs were not tightened down; it would have been impossible for them having done so, due to their corroded condition. All they had to do was to kick the lug over and open the plate.

The deck of the barge "Peter B" had numerous cracks all over. I am of the opinion that these cracks opened as a result of the sinking and raising of this barge; but I am further of the opinion that had the deck been in a strong condition instead of a badly deteriorated and rusted out condition, that cracks would not have occurred due to the sinking and raising of the barge.

I trust that this will serve to answer your inquiries. If there is anything further I can assist in, please advis.

Very truly yours,

R. L. WYNNE, Chief Surveyor
Houston District

RLW:hs

[fol. 355]

EXHIBIT WYNNE 3

COPY

THE BOARD OF UNDERWRITERS OF NEW YORK
617 Caroline Street
Houston, Texas

September 21, 1944

Southwestern Sugar & Molasses Company
Texas City, Texas

Attn: Mr. Frieler

Gentlemen:

Confirming our telephone conversation of yesterday, please be advised that I wish to attend on board the barge PETER B. prior to that barge being discharged at Texas City. Please give me as much advance notice as possible in order that I may attend without causing you any inconvenience.

Very truly yours,

(sgd.) R. L. WYNNE
R. L. WYNNE

RLW:lg

[fol. 356]

EXHIBIT RESPONDENT 3

June 17, 1952

Re: Southwestern Sugar & Molasses
Co. vs. River Terminals Corporation,
Our file #9985.

Edwin H. Grace, Esquire,
Baronne Building,
New Orlans 12, Louisiana.

Dear Mr. Grace:

I refer to the call which you made on last Saturday morning, while we were taking the deposition of Captain

Allemand, for the original log book of the tug DOTTI DEE for the voyage following which the barge PETER sank at Texas City in September of 1944.

I have undertaken to locate this log book and find tha it was destroyed when the tug DOTTIE DEE sank i the Intracoastal Canal at Mile 194 west of Harvey, o January 1, 1945. You can confirm this sinking, if yo wish, from the records of the United States Engineers an from Picton & Company, of Port Arthur, Texas, who raise the tug on January 3, 1945.

Will you stipulate the result of my investigation, o will you require proof by deposition? I would appreciat an early reply, because, like you, I am anxious to wind this matter up.

Cordially,

SBL;LC

[fol. 357]

EXHIBIT RESPONDENT 4

JOHN D., M.A. & EDWIN H. GRACE
Lawyers

Baronne Building
New Orleans 12, La.

June 20, 1952

Selim B. Lemle, Esq.
National Bank of Commerce Bldg.,
New Orlans, 12, La.

RE: Southwestern Sugar & Molasses
Company vs. River Terminals Corp.
Your file No. 9985—Ours 20, 537

Dear Mr. Lemle:

In reply to your letter of June 17th, if, according to your investigation, the log entries made by the master of the DOTTIE DEE as to the voyage in question, were not taken therefrom by your client and remained on the tug, and she sank on January 1, 1945, and these entries

remained in a log book and were destroyed, I will agree to stipulating that the named witness or witnesses, if called, would so testify.

Cordially,

(sgd) Edwin H. Grace

EHG/no

[fol. 358]

In United States District Court

Interlocutory Decree—January 2, 1957

This cause came on for trial at a former day on the pleadings, evidence, and proofs offered on behalf of the respective parties and the matter was submitted, when the Court took time to consider;

Now, on due consideration thereof;

It Is Ordered, Adjudged, and Decreed that libellant, Southwestern Sugar & Molasses Company, recover from respondent, River Terminals Corporation, its damages, together with interest and costs;

It Is Further Ordered, Adjudged, and Decreed that if the parties should fail to agree on the amount of damages within thirty (30) days from the date of the entry of this Decree, the quantum shall be heard by a commissioner to be appointed by the Court on motion of proctors for libellant.

New Orleans, Louisiana, January 2, 1957.

(sgd) Herbert W. Christenberry, United States District Judge.

Entd: Jan. 3, 1957.

IN UNITED STATES DISTRICT COURT

MOTION OF RESPONDENT FOR A REHEARING OR A NEW TRIAL AND ENTRY OF A NEW INTERLOCUTORY JUDGMENT—Filed January 4, 1957

Now comes the respondent and moves the Court to set aside the interlocutory decree entered herein on January 3, 1957, and to grant to respondent a new trial or rehearing and to direct the entry of a new interlocutory deceee (sic) [fol. 359] on the ground that the interlocutory decree entered herein is contrary to the law and the evidence for the reason, among others, that the Court failed to find that the sinking of the Barge PETER B was not due to any fault of respondent, but was due solely to the inherent unseaworthiness of the barge and the failure of its owner to discharge the barge timely when its damaged condition was known to the owner; whereas the Court should have held that in these circumstances and under the applicable law and the jurisprudence of the United States Court of Appeals for the Fifth Circuit, as exemplified in *Stall and McDermott* v. *Southern Cross*, 196 F. 2d 309, 1952 A.M.C. 876, the respondent should have been held blameless and the libel dismissed at libellant's cost.

Respondent files herewith its brief in support of the foregoing motion.

Lemle & Kelleher, By: (sgd) Selim B. Lemle, Proctors for Respondent, River Terminals Corporation.

IN UNITED STATES DISTRICT COURT

HEARING ON MOTION FOR NEW TRIAL, ETC. & ORDER DENYING SAME—February 6, 1957

Christenberry, J:

This cause came on this day to be heard on motion of respondent for a rehearing or a new trial and entry of a new interlocutory judgment.

Present: William T. Foley, Jr., Esq., Amos L. Ponder, Jr., Esq., Proctors for Libellant.

[fol. 360] Selim B. Lemle, Esq., Proctor for Respondent.

Argument by counsel for parties;

It Is Ordered by the Court that the motion of respondent for a rehearing or a new trial and entry of a new interlocutory judgment be and the same is hereby denied.

Entd: Feb. 11, 1957.

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL ON BEHALF OF RIVER TERMINALS CORPORATION—Filed February 21, 1957

Please take notice that River Terminals Corporation, respondent in the above-styled and numbered matter, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the interlocutory decree in favor of libellant which was entered herein on the third day of January, 1957, and from the order denying rehearing or a new trial entered herein on the eleventh day of February, 1957.

Lemle & Kelleher, By (sgd) Selim B. Lemle, Proctors for River Terminals Corp.

Service accepted; citation of appeal waived; all other rights reserved.

P. M. Flanagan, George L. Varian, (sgd) Amos L. Ponder, Jr., Proctors for Southwestern Sugar & Molasses Co. Inc.

[fol. 361]

IN UNITED STATES DISTRICT COURT

DESIGNATION OF CONTENTS BY APPELLANT—Filed February 21, 1957

To: Honorable A. Dallam O'Brien, Clerk, United States District Court, Post Office Building, New Orleans, Louisiana.

Dear Sir:

Please make up the record in this case to be transmitted to the Circuit Court of Appeals in accordance with Rule 49

of the admiralty rules of the Supreme Court of the United States, including, without limitation, all interrogatories and the answers thereto and all depositions of witnesses except and omitting the depositions of witnesses who testified in open court.

Lemle & Kelleher, By (sgd) Selim B. Lemle.

New Orleans, Louisiana, February 20, 1957.

IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed February 21, 1957

1. The Court erred in holding that the libellant, Southwestern Sugar and Molasses Company (Inc.), had any interest in the Barge PETER B which entitled to to (sic) maintain a libel for damage to the barge.

2. The Court erred in holding that in the movement of the Barge PETER B with a cargo of molasses therein from Reserve, Louisiana, to Texas City, Texas, the respondent, River Terminals Corporation, was guilty of negligent towage.

[fol. 362] 3. The Court erred in failing to give effect to Section 3 of the Harter Act and failing to exonerate River Terminals Corporation.

4. The Court erred in failing to give effect to the tariffs of River Terminals Corporation and to the terms and conditions of the bill of lading issued by River Terminals Corporation and delivered to Southwestern Sugar and Molosses Company (Inc.).

Lemle & Kelleher, By (sgd) Selim B. Lemle, Proctors for River Terminals Corporation, Respondent.

IN UNITED STATES DISTRICT COURT

MOTION AND ORDER TO SEND ORIGINAL EXHIBITS TO U.S. COURT OF APPEALS

On motion of River Terminals Corporation, appellant, through its proctors of record, Lemle & Kelleher, and on

suggestion to the Court that it is impracticable to copy or reproduce certain exhibits on file herein and that such exhibits should be sent to the United States Court of Appeals for the Fifth Circuit in the original as part of the transcript of appeal:

It Is Ordered by the Court that the following exhibits on file herein be transmitted to the United States Court of Appeals for the Fifth Circuit in the original as part of the transcript on the record of appeal:

1. Exhibit A—River Terminals Corp. Bill of lading
2. RTC-1 A&B—Photostats of Diagram of vessel

[fol. 363]

3. Documents attached to answer by libellant to interrogatories of Respondent
4. Photostats of Report of Survey of "Peter B"
5. Libellant C—Report from Godchaux Sugars
6. RTC 2—Bill of Sale of Enrolled Vessel
7. RTC 3—Bill of Sale of Enrolled Vessel
8. RTC 4—Bill of Sale of Enrolled Vessel
9. RTC 5—Photograph
10. RTC 6—Photograph
11. RTC 7—Photograph
12. RTC 8—Photograph
13. RTC 9—Photograph
14. RTC 10—Photograph
15. RTC 11—Letter from Southwestern to A. I. Kaplan
16. Libellant 2—Master's Log
17. Libellant 2A—Writing in pen on cover
18. Libellant 8—Drawing on yellow sheet
19. Libellant 12—Copy of Contract of Port Houston Iron Works, Inc.

20. Libellant 13—Pencil drawing

21. Libellant 14—Statement of A. I. Kaplan

22. Libellant 15—Statement of Continental Ins. Co. of New York.

23. Libellant 16—Certified copy of Partial List of Vessels traversing Harvey Lock

24. Libellant 17—Certified copy of Partial List of Vessels traversing Vermillion Lock

25. Libellant 18—Weather Report

26. Libellant 19—Photostat of Report of Survey (6-9-44)

27. Libellant 20—Report of Survey (10-21-44)

[fol. 364]

28. Respondent #4—Letter from River Terminals Corp. to War Dept.

29. Lambdin 1—Pencil drawing and report

30. Lambdin 2—Report of Survey

31. Grant 1—Blue Print

32. Grant 2—Blue Print

33. Wynne 1—Photostat of Report of Survey (10/13/44)

34. Allemand 2—Master's Log

s/ Herbert W. Christenberry, United States District Judge.

New Orleans, Louisiana, May , 1957.

Respectfully submitted:

Lemle & Kelleher, Proctors for River Terminals Corp., By: s/ Selim B. Lemle.

Approved: s/ Amos L. Ponder, Jr., Proctor for Libellant.

[fol. 365] Clerk's Certificate (omitted in printing).

[fol. 367]

Supplemental Transcript of Record

In United States District Court

Findings of Fact and Conclusions of Law—Filed July 15, 1957

Christenberry, J:

The Court, having heard the evidence and the arguments of proctors, and having taken time to consider the matter, hereby makes the following findings of fact and conclusions of law:

Findings of Fact

I.

At all material times, libellant Southwestern Sugar and Molasses Company, Incorporated (hereafter called Southwestern), was a corporation existing under the laws of Texas, with its principal office and place of business at Texas City, Texas, and engaged in the business of selling blackstrap molasses products.

II.

At all material times, respondent River Terminals Corporation (hereafter called River) was a corporation existing under the laws of Delaware, with offices at Houston, Texas, and at Harvey and New Orleans, Louisiana, and engaged in operating tow boats.

III.

At all material times, International Transportation Corporation (hereafter called International) was a corporation existing under the laws of New York, with an office at Texas City, Texas.

[fol. 368]

IV.

At all material times, International was the owner of the steel tank barge "PETER B", which was during September, 1944, bareboat chartered for an indefinite period of time to Southwestern. The charter party agreement

provided that Southwestern would operate the "PETER B" and maintain and repair the barge, and return her to International at the termination of the charter in the same good order and condition as when delivered, ordinary wear and tear excepted.

V.

The dumb barge "PETER B" was a steel tank barge of 175 feet in length, 26 feet 4 inches in breadth, and 11 feet in depth. She was fitted with 3 cylindrical tanks on her center line and 8 rectangular tanks, four on each side, each separated by water-tight bulkheads. The rectangular tanks, were numbered from bow to stern on the port side: 1, 3, 5 and 7; and from bow to stern on the starboard side: 2, 4, 6 and 8. She was also fitted with forward and aft dry rakes, and there was a gasoline powered pump in the aft rake, used for pumping cargo. The barge was being operated by Southwestern for the carriage of molasses in tow between Reserve, Louisiana, and Texas City, the barge having completed approximately thirteen (13) trips in all between said ports via the Intracoastal Waterway in tow of River's tugs during the charter period.

[fol. 369]

VI.

On September 16, 1944, a Saturday, the "PETER B" arrived at Reserve, Louisiana, and was tendered at the Godchaux Sugar Refinery for the loading of molasses. Prior to loading, the cargo tanks were inspected and found tight and dry, and the barge was in apparent good condition.

VII.

Loading was commenced on the same day under the supervision of Mr. L. H. Frieler, Southwestern's Texas City manager. The cargo tanks were loaded from aft to forward and after about 10 inches of cargo had been loaded into Number 2 tank, a noise was heard from this tank.

VIII.

Loading was immediately stopped and investigation revealed that a crack existed in the starboard shell plate ap-

proximately 6 to 8 inches in length and located about 80½ inches from the top of Number 2 cargo tank. No cargo was thereafter placed in either Number 1 or 2 cargo tanks. Because these tanks were substantially empty, her freeboard was somewhat greater than her normal freeboard of 3 feet 2 inches forward and 2 feet 6 inches aft.

IX.

Prior to the loading, it had been orally agreed between Southwestern and River that River would pick up the barge "PETER B" when loaded and tow it to Harvey for integration in a tow of several barges which would be towed through the Intracoastal Waterway to Texas City, the usual practice carried out by River with respect to [fol. 370] previous trips of the "PETER B". This movement, according to the bill of lading issued by River on September 17, 1944, was subject to River's tariff on file with the Interstate Commerce Commission, which tariff contained the following provisition: (sic)

> "When shipments are transported in barges furnished by owner, shippers, consignees or parties other than the carrier, such barges and (or) cargoes will be handled at owner's risk only, whether the loss or damage is caused by negligence or otherwise."

X.

Upon termination of the loading the evening of September 16, 1944, Frieler attempted to notify River by telephone at its Harvey and New Orleans offices about the condition of cargo tanks Number 1 and 2, but he was unsuccessful. The following morning he again attempted to contract (sic) River at these offices, but to no avail, and he found the barge "PETER B". had already been towed from its loading berth by River's tug.

XI.

Frieler proceeded to Houston and on the following morning, Monday, conferred with a Mr. Hinkle, River's General Agent there. He advised Hinkle about the condi-

tion of the barge and requested that this information be reported immediately to the master of the towing tug, so that the "PETER B" could be carefully observed, and that he, Frieler, be periodically advised about the movement of the barge. Hinkle agreed to this, and informed Frieler that the integrated tow would not depart Harvey until the following morning, and, in any event, that the tugs were equipped to pump the barge as might be required.

[fol. 371] XII.

River's Houston office failed to transmit such information to the tug master, and failed to notify Frieler of the movement of the "PETER B".

XIII.

Frieler went to Texas City and upon arrival spoke by telephone with a Captain R. L. Wynne, a surveyor for Southwestern's cargo insurer, in Houston. He informed Wynne about the condition of the barge and it was agreed at Wynne's suggestion that the barge would not be unloaded until a survey was made on September 25, 1944, the following Monday, and the expected arrival date of the barge. On Thursday, Frieler telephoned Hinkle in Houston, and inquired about the position of the barge, but Hinkle had received no advices. Hinkle confirmed, however, that the expected arrival date was the weekend of September 23, 24, 1944. Frieler advised Hinkle that he would be out of town during that period and that no one would be present at Southwestern's terminal who was familiar with equipment and that he would cancel his trip if there was any difficulty expected. Hinkle advised him that none was expected. Frieler then spoke with Wynne, the surveyor, who indicated that he still wished to be present before the cargo was discharged. Frieler then left Texas City and remained out of that city until Monday, September 25, 1944.

XIV.

Meanwhile, the "PETER B" had been individually towed from Reserve to Harvey by the tug "JOHN M". The barge

[fol. 372] was there integrated with three other barges and proceeded in tow by River's tug "SAMBO" for Port Arthur, through the Intracoastal Waterway. At the time the tow passed the Harvey Locks, the barge "PETER B" maintained her trim, but started losing it thereafter, and at the Vermillion Locks her mean draft had increased 2 feet. Upon arrival at Port Arthur she was badly out of trim, her forward starboard corner having a freeboard of not more than 9 inches, and her aft freeboard having substantially the same draft as when she left Reserve, namely, something in excess of 2 feet, 3 inches. At Port Arthur, Texas, the "PETER B" was broken out of the tow and pushed individually, stern first, by River's tug "DOTTIE DEE", to Texas City. During this last leg of the voyage, when it was apparent that the Number 2 tank was full of water, no inspection was made of this tank or the rake tanks, and the barge was pushed stern first across Galveston Bay at an average speed of 7 miles per hour.

XV.

The "DOTTIE DEE" and her barge arrived at Pier O, Texas City, about midnight on Friday, September 22, 1944, and the barge was berthed across the tee of the pier. Later during the night the "DOTTIE DEE" returned and pushed the barge into the slipway, stern first, so that the deck of the forward end, which was then at the water's level, was exposed to the wash of vessels proceeding in the channel. No inspection of the barge was made then, nor was any notification of the arrival given to Southwestern at that time. Approximately 2000 feet distant [fol. 373] from and opposite Pier O, Snake Island in Galveston Bay provides a flat or shoal where the "PETER B" could have been beached without risk of damage or sinking.

XVI.

The next morning, Saturday, September 23, 1944, a handyman of Southwestern found the barge, at which time the forward starboard corner was at the water level and waves were washing over the deck. A clerical employee of

Southwestern telephoned River's Houston office, notified them of the condition of the barge, and requested that a tug be sent to pump the barge or otherwise care for it. This employee was informed that there was nothing to be concerned about, and that the barge was not in danger of sinking. Wynne, the surveyor, was also notified, but he concurred in the opinion of River's Houston representative that there was no danger of the barge sinking, and stated that he would be down to Texas City to survey it Monday morning, as he had previously agreed.

XVII.

The following morning, Sunday, September 24, 1944, the barge was found sunk by the head in about 30 feet of water, with the aft rake tank above water.

XVIII.

Numerous unsuccessful attempts to raise the forward end of the barge were made after the arrival of Wynne on Sunday afternoon, and subsequently the "PETER B" was raised, drydocked and repaired.

[fol. 374]

XIX.

At all times, Southwestern was the owner of the molasses loaded aboard the "PETER B".

Conclusions of Law

I.

The action is within the Admiralty jurisdiction of this Court.

II.

The services furnished to Southwestern by River were those of towage and not carriage or afreightment. *Mississippi Valley Barge Line Co.* v. *T. L. James & Co.* (C.A. 5th, 1957), 244 F. 2d 263.

III.

Consequently the release from liability for negligence contained in River's tariff referred to in its bill of lading covering this movement was invalid. Bisso v. Inland Waterways Corp., 349 U.S. 85, 99 L. Ed. 911, 75 S. Ct. 629 (1955).

IV.

However, the tug is not liable as an insurer or as a common carrier. It owes a duty to its tow to exercise such reasonable care and maritime skill as prudent navigators use in the performance of similar services. Any conduct alleged to have fallen below this standard must be affirmatively shown, and the burden of proving this type of negligence rests upon those who seek to establish liability therefor. *Stall & McDermott* v. *The Southern Cross* C.A. 5th, 1951), 196 F. 2d 309.

[fol. 375]

V.

This duty to exercise such reasonable care and maritime skill as prudent navigators employ in the performance of similar services, is not lessened by the fact that the vessel was unseaworthy at the beginning of the voyage, as was the situation in this case, when the tower is placed on notice of this unseaworthy condition. The tug's duty is to exercise reasonable care to safeguard its tow. *Henry Dubois Sons Co.* v. *Pennsylvania R. Co.* (C.A. 2d, 1931) 47 F. 2d 172; and *McCormick* v. *Jarrett* (D.C. E.D. Mo., 1899), 37 F. 380.

VI.

The loss and damage to the cargo and barge was the proximate result of negligence on the part of River and its towing tugs, in that, with specific knowledge of a crack in the way of Number 2 cargo tank prior to departure of the barge from Harvey:

(a) It failed to sound and pump the barge "PETER B" when her loss of freeboard forward made it apparent that the "PETER B" was taking water in either the forward rake tank or the Number 2 cargo tank, or both;

(b) it failed to stand by and sound and pump the "PETER B" at any time after arrival of the barge at Texas City when it was, or should have been, evident that said barge was taking water in the forward rake tank or the Number 2 cargo tank, or both, and was in danger of sinking;

(c) it moored the "PETER B" in danger of sinking with the forward starboard corner, which was at the water level, [fol. 376] exposed to the wind and waves, and the wash of vessels passing across the end of the slipway;

(d) it moored the "PETER B" in a deep water slipway, in an exposed and sinking condition, when the barge could and should have been moored in shallow water or beached on a flat, such as Snake Island, a short distance away; and

(e) it assured a clerical employee of Southwestern, who River knew was unfamiliar with marine equipment, that the "PETER B" was in safe condition on Saturday, September 23, when it knew, or should have known, that the barge was in danger of sinking and knew that there was no person available at Southwestern, capable of exercising any judgment as to the actual condition of such barge.

VII.

Southwestern, as the bareboat charterer of the barge "PETER B" and owner of the molasses loaded therein, is entitled to recover on its own behalf and as bailee of the barge for the damage sustained by the barge and for the loss of the molasses cargo.

An interlocutory decree has been entered accordingly.

New Orleans, Louisiana, July 12, 1957.

s/ Herbert W. Christenberry, United States District Judge.

[fol. 377] Clerk's Certificate (omitted in printing)

[fol. 378]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RIVER TERMINALS CORPORATION,

versus

SOUTHWESTERN SUGAR & MOLASSES COMPANY.

No. 16699.

ARGUMENT AND SUBMISSION—Dec. 2, 1957

On this day this cause was called, and after argument by Selim B. Lemle, Esq., for appellant and Amos L. Ponder, Esq., 1st Assistant Attorney General of Louisiana, for appellee, was submitted to the Court.

[fol. 379]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16699

RIVER TERMINALS CORPORATION, Appellant,

versus

SOUTHWESTERN SUGAR & MOLASSES COMPANY, Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

OPINION—April 9, 1958.

Before Borah, Tuttle and Cameron, Circuit Judges.

TUTTLE, Circuit Judge: This is an appeal from a judgment for libelant for the loss of its cargo of molasses shipped by it on its own barge under tow of libellee-appellant. The libel claimed, and the trial court found, that the barge

sank and its cargo was lost as a result of negligent acts of appellant in navigation or management of the tow. [fol. 380] The libellee asserted a defense which, if available to it, makes unnecessary consideration of the case on the merits. This defense is: Appellant was a certificated common carrier under the terms of Part III of the Interstate Commerce Act, 49 U.S.C.A. §901, et seq., which was required to, and which did, file tariff schedules with the Interstate Commerce Commission, and all of whose movements of cargo must be in accordance with its certificate and must, under the statute, conform to its filed tariffs, and that the tariffs applicable to this movement relieved it from all liability for negligence or otherwise.

The trial court, in its findings of fact, said:

> "This movement, according to the bill of lading issued by River on September 17, 1944, [the day the shipment commenced] was subject to River's tariff on file with the Interstate Commerce Commission, which tariff contained the following provisions:
>
> "'When shipments are transported in barges furnished by owner, shippers, consignees or parties other than the carrier, such barges and (or) cargoes will be handled at owner's risk only, whether the loss or damage is caused by negligence or otherwise.'"

Clearly, therefore, unless this provision of the tariff, which, of course, becomes a part of the contract, is to be ignored, the appellant is entitled to its benefit. As to whether the quoted provision of the tariff is valid or is void as against public policy we must at once recognize that in the recent case of *Mississippi Valley Barge Line Company* v. *T. L. Jamse* (sic) *& Co., Inc., et al.*, 5 Cir., [fol. 381] 244 F. 2d 263, we held such a provision void and of no effect. In a case which, so far as is germane to the present issue, was identical with this one, the defense was made that both the tariff and the bill of lading (there issued several weeks after the damage) relieved the towing company of liability. Referring to *Bisso* v. *Inland Waterways Corp.*, 349 U.S. 85, a case involving a private contract of towage, in which the parties by contract sought

to relieve the tower from results of its own negligence, but which efforts the Supreme Court, in a 6-3 opinion, struck down as against public policy, this Court in an opinion participated in by the writer of this opinion, said:

> "It is sufficient to say that the validity of this claim has been definitely and conclusively settled against it in the Bisso case, and that, as pointed out in the opinion of the district judge below and in the briefs of the appellees here, the fact that this illegal clause is embodied in a tariff cannot make it legal."

Recognizing full well the unsettling effect of differing decisions within the same circuit in similar cases, and with every deference to the views of our colleagues who decided the Mississippi Valley Barge Line Company case, we deem it to be our clear duty to consider carefully what the law is on this important and far-reaching question. If we conclude that the law was incorrectly stated by us previously, it is our duty to proceed in this cause as we believe the law requires.

[fol. 382] There is an important factor in cases of this kind that was not commented on by this Court in the earlier case. It looms so large in the consideration we now give to this case that we think it likely that failure by the Court to discuss it in the Mississippi Valley opinion indicates that it was overlooked. That is the rule frequently stated by the Supreme Court that "Until changed, tariffs bind both carriers and shippers with the force of law." *Lowden* v. *Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516, 520; *Crancer* v. *Lowden*, 315 U.S. 631, 635.

There is then the equally important principle, also not discussed in our earlier opinion, that when tariffs embody terms whose initial adoption or subsequent modification involves issues of transportation policy, they ought not to be ignored, set aside, or otherwise set for naught, except after consideration by the Interstate Commerce Commission in the interests of a uniform and expert administration of the regulatory scheme laid down by the act. *United States* v. *Western Pacific Railway Co.*, 352

U.S. 59. An illustration in which the Supreme Court applied this principle is *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U.S. 422, and its subsequent appearance sub nom. *El Dorado Oil Works, et al.* v. *United States, et al.*, 328 U.S. 12. And see, for cases in which the approved procedure was followed in the first instance, *Secretary of Agriculture* v. *United States, et al.*, 350 U.S. 162, and *Lowden* v. *Simonds-Shields-Lonsdale Grain Co., supra.*

For the reasons made amply clear in Part III of the Interstate Commerce Act, 49 U.S.C.A. 901, et seq. Con- [fol. 383] gress has confided to the Interstate Commerce Commission the devising and controlling of a regulatory scheme over the use of water carriers in foreign and domestic commerce. Under this law[1] every common carrier (and

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[1] Sections 306(a) and 306(c) of Part III of the Interstate Commerce Act (49 U.S.C.A., Section 906):

"(a) Every common carrier by water shall file with the Commission, and print, and keep open to public inspection tariffs showing all rates, fares, charges, classifications, rules, regulations, and practices for the transportation in interstate or foreign commerce of passengers and property between places on its own route, and between such places and places on the route of any other such carrier or on the route of any common carrier by railroad or by motor vehicle, when a through route and joint rate shall have been established. Such tariffs shall plainly state the places between which property or passengers will be carried, the classification of property or passengers and, separately, all terminal charges, or other charges which the Commission shall require to be so stated, all privileges or facilities granted or allowed, and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such rates, fares, or charges, or the value of the service rendered to the passenger, shipper, or consignee.

. . . .

"(c) No common carrier by water shall charge or demand or collect or receive a greater or less or different compensation for transportation subject to this part or for any service in connection therewith than the rates, fares, or charges specified for such transportation or such service in the tariffs lawfully in effect; and no such carrier shall refund or remit in any manner or by any device any portion of the rates, fares, or charges so specified, or extend to any person any privileges

for the purpose of this discussion this includes towers as well as other carriers) is required to file and keep on file with the Interstate Commerce Commission its tariff "showing all rates, fares, charges, classifications, rules, regulations, and practices for the transportation [fol. 384] of interstate or foreign commerce . . . between places on its own route," which shall plainly state, among other things, "any rules or regulations which in anywise change, affect, or determine any part of the aggregate of such rates, fares, or charges, or the value of the services rendered to the passenger, shipper or consignee." No carrier is permitted, under the Act to depart, in the furnishing of carriage, from its published tariffs.

The Commission may, under the Act, permit the filed tariffs to become effective or it may suspend them temporarily and either on its own motion or on the motion of an aggrieved party, inquire into the reasonableness and legality of any such rate or charge. Upon the resolution of any such inquiry, the Commission makes its order which is binding and final unless brought in question in the manner provided in 28 U.S.C.A. §§2321, 2323. This is by suit against the United States and the Interstate Commerce Commission in which any interested party may intervene. It is tried by a statutory three-judge district court from which there is a direct appeal to the Supreme Court.

In the exercise of its statutory power the Commission permitted the appellant to file its questioned tariffs which, so far as this record shows, became immediately effective. The record does not disclose that either on the objection of shipper or otherwise any complaint or other challenge has ever been made with the Commission attacking the validity of the tariffs. We are asked to [fol. 385] hold that, regardless of the circumstances prevail-

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or facilities for transportation affecting the value thereof except such as are specified in its tariff: Provided, That the provisions of sections 1 (7) and 22 of Part I (which relate to transportation free and at reduced rates), together with such other provisions of such part (including penalties) as may be necessary for the enforcement of such provisions, shall apply to common carriers by water."

ing in the towing industry which caused the appellant to fix its freight charges on the basis of appellee's assuming all the risks of negligent navigation of the tower, all of which must be assumed to have caused the Commission to "approve" the tariffs and which were deemed sufficiently acceptable to shippers as to prevent them from filing a complaint thereabout, there is a public policy that outlaws the exculpatory provision as a matter of law. This it is said, follows from the Court's decision in Bisso, *supra,* outlawing such a clause in a private contract of towage.

We think that when Congress has given to the Commission the extensive supervisory and regulatory power over the shipping industry with special responsibilities as to the prevention of monopolistic practices, and when the Commission permits the establishment of rates which limit the liability of carriers (presumably because there are, or may be required to be at the instance of a complaining shipper, alternative rates which place full liability on the tower) it has done so in the proper discharge of its responsibility to shipper, carrier and the public alike, and no overweening policy to invalidate one of the terms of such a tariff arises. Certainly not as a matter of law and without benefit of the Commission's initial inquiry and findings relating to the matter.

As is indicated in the concurring opinion, also expressed somewhat differently in the dissenting opinion in the Bisso case, the presence or absence of an overriding public policy [fol. 386] depends on facts and circumstances that in litigation between private parties must be developed in the record:

> "It may be fairer in the long run to let the tugboat operator free himself (by contract) from his own negligence and transfer the liability to the shippers who employ his services. But the very statement of the problem raises large questions of policy on which the present records throw no light. We would have to know much more about the economics and organization of the tugboat industry than we are offered here to fashion a new rule." 349 U.S. 85, 97.

And see the discussion on the public policy aspect of the private towage case at page 117 (dissenting opinion).

It would seem that as to common carriers, as to which Congress has given regulatory power to the Commission, the Commission's actions with respect to the terms of carriage should not be upset by the courts without their first having the factual background mentioned above first examined by the Commission and its relation to the assailed clause inquired into by it.

That there is no general public policy forbidding the exculpation of water carriers for their negligence is made amply apparent by the enactment by Congress more than half a century ago of the Harter Act,[2] which in effect re- [fol. 387] lieves carriers of liability for error or fault in navigation or management of the vessel if they have provided a seaworthy craft. Here appellant claims to be entitled to that very protection, since it says it is such owner of a vessel as is comprehended by the Harter Act. Without deciding that issue, since we think we do not reach it,[3]

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[2] "§192. Limitation of liability for errors of navigation, dangers of the sea and acts of God. If the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service." 46 U.S.C.A. §192.

[3] It is to be noted that in Mississippi Valley Barge Line Co. v. James, supra, on a slightly different record, we did hold that this statute was not applicable because towage rather than affreightment was involved. The Harter Act does not apply to towage and the difference here is that the trial court found as a fact that this movement was under the terms of a bill of lading subject to tariffs that were clearly adjusted to affreightment, but then concluded that this too was towage.

but assuming for the purpose of this discussion that the terms of the Act do not apply here because this is to be considered a movement of towage rather than "transportation of property," the existence of the law is not consistent with a theory that at all times and under all circumstances it is against public policy for water carriers to be free of liability for their own negligence. We think the Supreme Court did not so decide in Bisso and we think that such exemption from liability may, within the purview of the Interstate Commerce Act, be one of the matters with which the Commission may deal in approving rates, charges and [fol. 388] services of the carriers whose activities it has the duty to regulate. In any event we conclude that we should not hold such a part of a published tariff void until the parties have proceeded administratively to have it set aside. The method of such administrative determination is clearly set forth in *General American Tank Car Corp.* v. *El Dorado Terminal Co., supra,* and see *United States* v. *Western Pacific R. Co., supra.*

Nor do we think that anything in Section 920(d)[4] of Part III of the Interstate Commerce Act requires any different holding. It provides only that none of the provisions of the statute shall of themselves be held to work any change in liabilities, etc. This is not to say that the Act does not authorize the Commission to permit the parties, by their contracts of carriage, when approved by the Commission, to make such changes in their respective liabilities.

The judgment is reversed in order to afford the appellee reasonable opportunity to seek administrative action before the Commission to test the validity of the

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[4] "§920. Repeals.

. . . .

"(d) Nothing in this chapter shall be construed to affect any law of navigation, the admiralty jurisdiction of the courts of the United States, liabilities of vessels and their owners for loss or damage, or laws respecting seamen, or any other maritime law, regulation, or custom not in conflict with the provisions of this chapter."

49 U.S.C.A. §920(d).

challenged provision, otherwise to give full effect to the exculpatory clause and for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

[fol. 389]

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 16699

RIVER TERMINALS CORPORATION,

versus

SOUTHWESTERN SUGAR & MOLASSES COMPANY.

JUDGMENT—April 9, 1958

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed in order to afford the appellee reasonable opportunity to seek administrative action before the Commission to test the validity of the challenged provision, otherwise to give full effect to the exculpatory clause; and that this cause be, and it is hereby remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court;

It is further ordered, adjudged and decreed that the appellee, Southwestern Sugar & Molasses Company, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

[fol. 390]

MOTION OF APPELLEE FOR STAY OF MANDATE AND ORDER GRANTING SAME

(omitted in printing)

[fol. 393] Clerk's Certificate (omitted in printing).

[fol. 394]

SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING CERTIORARI—October 13, 1958

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

1 PETITION FOR WRIT OF CERTIORARI

2 BRIEF FOR RESPONDENT IN OPPOSITION

3 MOTION OF T. L. JAMES & CO., INC., ET AL., FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE.

4 OBJECTION OF RIVER TERMINALS CORPORATION, RESPONDENT, TO MOTION OF T. L. JAMES & CO., INC., ET AL., FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE.

5 ORIGINAL BRIEF ON BEHALF OF SOUTHWESTERN SUGAR AND MOLASSES CO., INC., PETITIONER.

6 BRIEF ON BEHALF OF RIVER TERMINALS CORPORATION, RESPONDENT.

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Supreme Court of the United States

OCTOBER TERM, 1958

No.

SOUTHWESTERN SUGAR AND MOLASSES CO., INC.,
Petitioner,

versus

RIVER TERMINALS CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CLEM H. SEHRT
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INDEX

JURISDICTION 2

OPINIONS BELOW 2

QUESTIONS PRESENTED 2

STATEMENT 3

SPECIFICATION OF ERRORS TO BE URGED 5

REASONS RELIED ON FOR GRANTING THE WRIT 6

The Court below had decided a federal question of law in conflict with the applicable decisions of this Court and has departed so far from the accepted and usual course as to call for an exercise of this Court's power of supervision 6

APPENDIX

Opinion of Fifth Circuit Court of Appeals 9

CASES CITED

Bisso vs. Inland Waterways Corp., 349 U.S. 85, 75 S. Ct. 629 (1955) 2

Mississippi Valley Barge Line Co. vs. T. L. James et al, 244 F. 2d 263, 144 F. Supp. 662 Cert. denied, 78 S. Ct. 121 6

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1958

No.

SOUTHWESTERN SUGAR AND MOLASSES CO., INC.,
Petitioner,

versus

RIVER TERMINALS CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE FIFTH CIRCUIT

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Southwestern Sugar and Molasses Co., Inc., prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit rendered on April 9, 1958, reversing a decree of the United States District Court for the Eastern District of Louisiana decreeing River Terminals Corporation liable as a tower to Southwestern Sugar and Molasses Co., Inc., for damages to the Barge Peter B and a cargo of molasses laden therein, filed July 15, 1957 (R 367).

JURISDICTION

Jurisdiction to review this case upon Writ of Certiorari is based on 28 U.S. Code 1254 (1).

OPINIONS BELOW

The opinion of the district court is in the record (R 367).

The opinion of the Court of Appeals is in the record (R 379).

QUESTIONS PRESENTED

The questions presented by this petition are:

1. Whether River Terminals Corporation can escape liability for its negligence because of the tariff filed with the Interstate Commerce Commission containing the following provisions:

> "When shipments are transported in barges furnished by owners, shippers, consignees or parties other than the carrier, such barges and (or) cargoes will be handled at owner's risk only, whether the loss or damage is caused by negligence or otherwise".

2. Whether a tower can incorporate in its tariff an exculpatory clause releasing it from liability and from the consequences of its own negligence when this Court has held such re-

lease from negligence clauses as void and against public policy in Bisso vs. Inland Waterways Corporation, 349 U.S. 85, 75 S. Ct. 629 (1955).

3. Whether the Courts and not the Interstate Commerce Commission, as Respondent contends, are the proper forums for determining whether release from liability clauses are void as contrary to public policy.

STATEMENT

Petitioner instituted suit in the United States District Court for the Eastern District of Louisiana against River Terminals Corporation for damages to the Barge Peter B and loss of a cargo of molasses laden therein. The libel claimed, and the trial court found, that the barge sank and its cargo was lost as a result of negligent acts of River Terminals Corporation in navigation or management of the tow (R 367).

The Court of Appeals did not consider the case on the merits as Respondent had asserted a defense, which they held, if available to Respondent, would make it unnecessary to consider the case on the merits. The defense was that Respondent was a certificated common carrier under the terms of Part III of the Interstate Commerce Act, 49 U.S.C.A., 901 et. seg., and was requested to, and did, file tariff schedules with the Interstate Commerce Commission and that the tariff applicable to this movement relieved it from all liability for negligence or otherwise, the pertinent part as follows:

"When shipments are transported in barges furnished by owner, shippers, consignees or parties other than the carrier, such barges and (or) cargoes will be handled at owner's risk only, whether the loss or damage is caused by negligence or otherwise".

The Court of Appeals went on to say:

"As to whether the quoted provision of the tariff is void as against Public Policy we must at once recognize that in the recent case of Mississippi Valley Barge Line Company v. T. L. James & Co., Inc., et al, 5 Cir., 244 F. 2d 263, we held such a provision void and of no effect".

The Court stated that in the Mississippi Valley case, supra, the issues were identical to this case. This Court in the Mississippi Valley case held that this identical provision was void and of no effect citing Bisso vs. Inland Waterways Corp., 349 U.S. 85, stating as follows:

"It is sufficient to say that the validity of this claim has been definitely and conclusively settled against it in the Bisso case, and that, as pointed out in the opinion of the district judge below and in the brief of the appellees here, the fact that this illegal clause is embodied in a tariff cannot make it legal".

The Court stated that if they had incorrectly stated the law previously it was their duty to proceed in this cause as they believed the law required.

The Court of Appeal reversed and remanded the trial court in order to afford the appellee reasonable opportunity to seek administrative action before the Interstate Commerce Commission to test the validity of this exculpatory clause, otherwise to give full effect to the exculpatory clause.

SPECIFICATIONS OF ERRORS TO BE URGED

The Court of Appeals erred as follows:

1.

In holding that River Terminals Corporation can escape liability for its negligence because of the tariff filed with the Interstate Commerce Commission containing provision "such barges and (or) cargoes will be handled at owner's risk only, whether the loss or damage is caused by negligence or otherwise".

2.

In holding that a tower can take the identical clause that was held void and against public policy by this Court in Bisso vs. Inland Waterways Corporation, 349 U.S. 85, 75 S. Ct. 629 (1955), and merely by inserting it in its tariff release it from the consequences of its own negligence, thereby, circumventing the decision of the Court.

3.

In holding that the Interstate Commerce Commission and not the Courts is the proper forum for determining

whether release from liability clauses are void as contrary to public policy.

REASONS RELIED ON FOR GRANTING THE WRIT

The Court below has decided a federal question of law in conflict with the applicable decisions of this Court and had departed so far from the accepted and usual course as to call for an exercise of this Court's power of supervision.

ARGUMENT

This same Court of Appeal, in the case of Mississippi Valley Barge Line Company v. T. L. James & Co., Inc., et al, 5 Cir., 244 F. 2d 263 held the same provision as involved in the instant case void and of no effect. Writs were applied for and denied in the United States Supreme Court on November 12, 1957, 78 S. Ct. 121.

As the Court is well aware, the question of the validity of the exculpatory clause releasing a tower from its own negligence was litigated in the various courts all over the United States and in some circuits was held valid and in others as void and against public policy. This Court in the Bisso case, supra, granted writs in order that this question be finally set at rest. This Court held that such an exculpatory clause was void and of no effect. Towers as well as shippers were apparently relieved because prior to this they were constantly in a quandry as to their rights.

However, now the Court of Appeal has disregarded the Bisso case and its own decision in the Mississippi Valley case and has reversed the decision of the trial court hold-

ing the clause void and of no effect and has remanded the case in order that petitioner have opportunity to seek administrative relief before the Interstate Commerce Commission to test the validity of this exculpatory clause, otherwise to give full effect to the exculpatory clause.

The question of the validity of this clause has already been passed on by this Court and the Court of Appeal is apparently trying to divest the Courts from having jurisdiction to pass on this all important question. The question of the validity of this clause has been squarely before this Court and passed upon. To allow the Interstate Commerce Commission to have jurisdiction to pass on this would merely throw this matter back into the turmoil that existed prior to the Bisso case.

To leave this matter as it now stands can only lead to confusion which we feel sure this Court intended to put at an end with the granting of writs and the subsequent decision in the Bisso case. If this matter is not set at rest, undoubtedly shipping interests will again be faced with conflicting decisions from the various circuits as there was prior to the Bisso case.

It is respectfully submitted that there is here presented a proper occasion for the exercise of the supervisory power of this Court; that the decision of the Court of Appeals

should be reversed and the decree of the District Court should be reinstated.

SOUTHWESTERN SUGAR & MOLASSES CO., INC.,
Petitioner

By: _____
CLEM H. SEHRT,
Counsel for Petitioner

OF COUNSEL
Amos L. Ponder, Jr.
P. M. Flanagan
New Orleans, Louisiana
July 3, 1958.

CERTIFICATE

I certify that copies of the foregoing brief have been served upon opposing counsel of record by placing the same properly addressed in the United States mail with adequate postage affixed thereto.

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16,699

RIVER TERMINALS CORPORATION,
Appellant,

versus

SOUTHWESTERN SUGAR & MOLASSES COMPANY,
Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

(April 9, 1958.)

Before BORAH, TUTTLE and CAMERON, Circuit Judges.

TUTTLE, Circuit Judge: This is an appeal from a judgment for libelant for the loss of its cargo of molasses shipped by it on its own barge under tow of libelee-appellant. The libel claimed, and the trial court found, that the barge sank and its cargo was lost as a result of negligent acts of appellant in navigation or management of the tow.

The libelee asserted a defense which, if available to it, makes unnecessary consideration of the case on the merits. This defense is: Appellant was a certificated common carrier under the terms of Part III of the Interstate Commerce Act, 49 U.S.C.A. §901, et seq., which was required to, and which did, file tariff schedules with the Interstate Commerce Commission, and all of whose movements of cargo must be in accordance with its certificate and must, under the statute, conform to its filed tariffs, and that the tariffs applicable to this movement relieved it from all liability for negligence or otherwise.

The trial court, in its findings of fact, said:

> "This movement, according to the bill of lading issued by River on September 17, 1944, [the day the shipment commenced] was subject to River's tariff on file with the Interstate Commerce Commission, which tariff contained the following provisions:
>
> "'When shipments are transported in barges furnished by owner, shippers, consignees or parties other than the carrier, such barges and (or) cargoes will be handled at owner's risk only, whether the loss or damage is caused by negligence or otherwise.'"

Clearly, therefore, unless this provision of the tariff, which, of course, becomes a part of the contract, is to be ignored, the appellant is entitled to its benefit. As to whether the quoted provision of the tariff is valid

or is void as against public policy we must at once recognize that in the recent case of *Mississippi Valley Barge Line Company v. T. L. James & Co., Inc., et al,* 5 Cir. 244 F. 2d 263, we held such a provision void and of no effect. In a case which, so far as is germane to the present issue, was identical with this one, the defense was made that both the tariff and the bill of lading (there issued several weeks after the damage) relieved the towing company of liability. Referring to *Bisso v. Inland Waterways Corp.*, 349 U.S. 85, a case involving a private contract of towage, in which the parties by contract sought to relieve the tower from results of its own negligence, but which efforts the Supreme Court, in a 6-3 opinion, struck down as against public policy, this Court in an opinion participated in by the writer of this opinion, said:

> "It is sufficient to say that the validity of this claim has been definitely and conclusively settled against it in the Bisso case, and that, as pointed out in the opinion of the district judge below and in the briefs of the appellees here, the fact that this illegal clause is embodied in a tariff cannot make it legal."

Recognizing full well the unsettling effect of differing decisions within the same circuit in similar cases, and with every deference to the views of our colleagues who decided the Mississippi Valley Barge Line Company case, we deem it to be our clear duty to consider carefully what the law is on this important and far-reaching question. If we conclude that the law was incorrectly stated

by us previously, it is our duty to proceed in this cause as we believe the law requires.

There is an important factor in cases of this kind that was not commented on by this Court in the earlier case. It looms so large in the consideration we now give to this case that we think it likely that failure by the Court to discuss it in the Mississippi Valley opinion indicates that it was overlooked. That is the rule frequently stated by the Supreme Court that "Until changed, tariffs bind both carriers and shippers with the force of law." *Lowden v. Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516, 520; *Crancer v. Lowden*, 315 U.S. 631, 635.

There is then the equally important principle, also not discussed in our earlier opinion, that when tariffs embody terms whose initial adoption or subsequent modification involves issues of transportation policy, they ought not to be ignored, set aside, or otherwise set for naught, except after consideration by the Interstate Commerce Commission in the interests of a uniform and expert administration of the regulatory scheme laid down by the act. *United States v. Western Pacific Railway Co.*, 352 U.S. 59. An illustration in which the Supreme Court applied this principle is *General American Tank Car Corp. v. El Dorado Terminal Co.*, 308 U.S. 422, and its subsequent appearance sub. nom. *El Dorado Oil Works, et al v. United States, et al*, 328 U.S. 12. And see, for cases in which the approved procedure was followed in the first instance, *Secretary of Agriculture v. United States, et al*, 350 U.S. 162, and *Lowden v. Simonds-Shields-Lonsdale Grain Co., supra.*

For the reasons made amply clear in Part III of the Interstate Commerce Act, 49 U.S.C.A. 901, et seq. Congress has confided to the Interstate Commerce Commission the devising and controlling of a regulatory scheme over the use of water carriers in foreign and domestic commerce. Under this law[1] every common carrier (and for the purpose of this discussion this includes towers as well as other carriers) is required to file and keep on file with the Interstate Commerce Commission its tariff "showing

[1]Sections 306(a) and 306(c) of Part III of the Interstate Commerce Act (49 U.S.C.A., Section 906):

"(a) Every common carrier by water shall file with the Commission, and print, and keep open to public inspection tariffs showing all rates, fares, charges, classifications, rules, regulations, and practices for the transportation in interstate or foreign commerce of passengers and property between places on its own route, and between such places and places on the route of any other such carrier or on the route of any common carrier by railroad or by motor vehicle, when a through route and joint rate shall have been established. Such tariffs shall plainly state the places between which property or passengers will be carried, the classification of property or passengers and, separately, all terminal charges, or other charges which the Commission shall require to be so stated, all privileges or facilities granted or allowed, and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such rates, fares, or changes, or the value of the service rendered to the passenger, shipper, or consignee.

- - -

"(c) No common carrier by water shall charge or demand or collect or receive a greater or less or different compensation for transportation subject to this part or for any service in connection therewith than the rates, fares, or charges specified for such transportation or such service in the tariffs lawfully in effect; and no such carrier shall refund or remit in any manner or by any device any portion of the rates, fares, or charges so specified, or extend to any person any privileges or facilities for transportation affecting the value thereof except such as are specified in its tariff: Provided, That the provisions of sections 1 (7) and 22 of Part I (which relate to transportation free and at reduced rates), together with such other provisions of such part (including penalties) as may be necessary for the enforcement of such provisions, shall apply to common carriers by water."

all rates, fares, charges, classifications, rules, regulations, and practices for the transportation of interstate or foreign commerce . . . between places on its own route," which shall plainly state, among other things, "any rules or regulations which in anywise change, affect, or determine any part of the aggregate of such rates, fares, or charges, or the value of the services rendered to the passenger, shipper or consignee." No carrier is permitted, under the Act to depart, in the furnishing of carriage, from its published tariffs.

The Commission may, under the Act, permit the filed tariffs to become effective or it may suspend them temporarily and either on its own motion or on the motion of an aggrieved party, inquire into the reasonableness and legality of any such rate or charge. Upon the resolution of any such inquiry, the Commission makes its order which is binding and final unless brought in question in the manner provided in 28 U.S.C.A. §§2321 2323. This is by suit against the United States and the Interstate Commerce Commission in which any interested party may intervene. It is tried by a statutory three-judge district court from which there is a direct appeal to the Supreme Court.

In the exercise of its statutory power the Commission permitted the appellant to file its questioned tariffs which, so far as this record shows, became immediately effective. The record does not disclose that either on the objection of shipper or otherwise any complaint or other challenge has ever been made with the Commission attacking the validity of the tariffs. We are asked to hold that, regard-

less of the circumstances prevailing in the towing industry which caused the appellant to fix its freight charges on the basis of appellee's assuming all the risks of negligent navigation of the tower, all of which must be assumed to have caused the Commission to "approve" the tariffs and which were deemed sufficiently acceptable to shippers as to prevent them from filing a complaint thereabout, there is a public policy that outlaws the exculpatory provision as a matter of law. This it is said, follows from the Court's decision in Bisso, *supra*, outlawing such a clause in a private contract of towage.

We think that when Congress has given to the Commission the extensive supervisory and regulatory power over the shipping industry with special responsibilities as to the prevention of monopolistic practices, and when the Commission permits the establishment of rates which limit the liability of carriers (presumably because there are, or may be required to be at the instance of a complaining shipper, alternative rates which place full liability on the tower) it has done so in the proper discharge of its responsibility to shipper, carrier and the public alike, and no overweening policy to invalidate one of the terms of such a tariff arises. Certainly not as a matter of law and without benefit of the Commission's initial inquiry and findings relating to the matter.

As is indicated in the concurring opinion, also expressed somewhat differently in the dissenting opinion in the Bisso case, the presence or absence of an overriding public policy

depends on facts and circumstances that in litigation between private parties must be developed in the record:

> "It may be fairer in the long run to let the tugboat operator free himself (by contract) from his own negligence and transfer the liability to the shippers who employ his services. But the very statement of the problem raises large questions of policy on which the present records throw no light. We would have to know much more about the economics and organization of the tugboat industry than we are offered here to fashion a new rule." 349 U.S. 85, 97.

And see the discussion on the public policy aspect of the private towage case at page 117 (dissenting opinion).

It would seem that as to common carriers, as to which Congress has given regulatory power to the Commission, the Commission's actions with respect to the terms of carriage should not be upset by the courts without their first having the factual background mentioned above first examined by the Commission and its relation to the assailed clause inquired into by it.

That there is no general public policy forbidding the exculpation of water carriers for their negligence is made amply apparent by the enactment by Congress more than

half a century ago of the Harter Act,[2] which in effect relieves carriers of liability for error or fault in navigation or management of the vessel if they have provided a seaworthy craft. Here appellant claims to be entitled to that very protection, since it says it is such owner of a vessel as is comprehended by the Harter Act. Without deciding that issue, since we think we do not reach it,[3] but assuming for the purpose of this discussion that the terms of the Act do not apply here because this is to be considered a movement of towage rather than "transportation of property," the existence of the law is not consistent with a theory that at all times and under all circumstances it is against public policy for water carriers to be free of liability for their own negligence. We think the Supreme Court did not so decide in Bisso and we think that such exemption from liability may, within the purview of the Interstate

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[2] "§192. Limitation of liability for errors of navigation, dangers of the sea and acts of God. If the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the things carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service." 46 U.S.C.A. §192.

[3] It is to be noted that in Mississippi Valley Barge Line Co. v. James, supra, on a slightly different record, we did hold that this statute was not applicable because towage rather than affreightment was involved. The Harter Act does not apply to towage and the difference here in that the trial court found as a fact that this movement was under the terms of a bill of lading subject to tariffs that were clearly adjusted to affreightment, but then concluded that this too was towage.

Commerce Act, be one of the matters with which the Commission may deal in approving rates, charges and services of the carriers whose activities it has the duty to regulate. In any event we conclude that we should not hold such a part of a published tariff void until the parties have proceeded administratively to have it set aside. The method of such administrative determination is clearly set forth in *General American Tank Car Corp. v. El Dorado Terminal Co., supra,* and see *United States v. Western Pacific R. Co., supra.*

Nor do we think that anything in Section 920(d)[4] of Part III of the Interstate Commerce Act requires any different holding. It provides only that none of the provisions of the statute shall of themselves be held to work any change in liabilities, etc. This is not to say that the Act does not authorize the Commission to permit the parties, by their contracts of carriage, when approved by the Commission, to make such changes in their respective liabilities.

The judgment is reversed in order to afford the appellee reasonable opportunity to seek administrative action before the Commission to test the validity of the challenged pro-

---

[4] "§920. Repeals.

. . . . .

"(d) Nothing in this chapter shall be construed to affect any law of navigation, the admiralty jurisdiction of the courts of the United States, liabilities of vessels and their owners for loss or damage, or laws respecting seamen, or any other maritime law, regulation, or custom not in conflict with the provisions of this chapter."
49 U.S.C.A. §920(d).

vision, otherwise to give full effect to the exculpatory clause and for further proceedings not inconsistent with this opinion.

REVERSED and REMANDED.

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JOHN T. FEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1958

No. 155

SOUTHWESTERN SUGAR AND MOLASSES CO., INC.,
Petitioner,

versus

RIVER TERMINALS CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

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HAUSER PRINTING CO., INC., NEW ORLEANS.

INDEX

Subject Index

	PAGE
SUMMARY OF STATEMENT	1
REASONS FOR REFUSING THE WRIT	4
CONCLUSION	9
APPENDIX	11
Assignments of Error Filed in the Court of Appeals	11
Memorandum Opinion of United States Court of Appeals for the Fifth Circuit in *Mississippi Valley Barge Line Company v. T. L. James & Co., Inc., et al.*, No. 16,469 on the Docket of that Court	12

Case Index

Bisso v. Inland Waterways Corporation, 349 U.S. 85, 75 S. Ct. 629	7
El Dorado Oil Works, et al v. United States, et al, 328 U.S. 12, 66 S. Ct. 843	7
Far East Conference v. United States, 342 U.S. 570, 72 S. Ct. 492	7
General American Tank Car Corp. v. El Dorado Terminal Co., 308 U.S. 422, 60 S. Ct. 325	7
Hamilton Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 36 S. Ct. 269	4
John Simmons Co. v. Grier Bros. Co., 258 U.S. 82, 42 S. Ct. 196	4
Lowden v. Simonds-Shields-Lonsdale Grain Co., 306 U.S. 516, 59 S. Ct. 612	7
Mississippi Valley Barge Line Company v. T. L. James & Co., Inc., et al, 244 F. 2d 263	4
Public Utilities Commission of California v. United States, ___ U.S. ___, 78 S. Ct. 446	7
Secretary of Agriculture v. United States, et al, 350 U.S. 162, 76 S. Ct. 244	7
United States v. Western Pacific Railway Co., 352 U.S. 59, 77 S. Ct. 161	7

Supreme Court of the United States

OCTOBER TERM, 1958

No. 155

SOUTHWESTERN SUGAR AND MOLASSES CO., INC.,
Petitioner,

versus

RIVER TERMINALS CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

SUMMARY OF STATEMENT

In the interest of accuracy we re-state here summarily the facts and the litigation and how it has been resolved by the District Court and by the United States Court of Appeals for the Fifth Circuit.

A cargo of molasses laden by the shipper in shipper's barge, transported by River Terminals Corporation with its tugs from Reserve, Louisiana, to Texas City, Texas, and there delivered to the named consignee, sank at the consignee's wharf some thirty hours after it had been tied off there. River Terminals Corporation was a common carrier by water subject to Part III of the Interstate Commerce Act, and performed the transportation

pursuant to the provisions of its tariff on file with the Interstate Commerce Commission. It issued its bill of lading in the form and in the manner prescribed by the I.C.C. tariff.

Claiming damages for alleged negligent towage, the petitioner, Southwestern Sugar and Molasses Co., Inc., filed its libel in the United States District Court for the Eastern District of Louisiana, New Orleans Division; then by a supplemental libel alleged the issuance of the bill of lading and sought damages for breach of the contract of carriage evidenced by this bill of lading.

River Terminals Corporation answered both the original and the supplemental libels, denying any negligence, alleging proper delivery and claiming the benefit of Section 3 of the Harter Act[1] and of the exculpatory clauses in its I.C.C. tariff and in the bill of lading.

The District Court held that the movement was one of towage; that River Terminals Corporation had been guilty of negligence; and that the exculpatory clauses in River Terminals Corporation's I.C.C. tariff and bill of lading were invalid; and issued an interlocutory decree holding River Terminals Corporation liable and retained jurisdiction to fix damages. From this interlocutory decree River Terminals Corporation prosecuted its appeal to the United States Court of Appeals for the Fifth Circuit, assigning error on four grounds,[2] which may be summarized as follows: The Court erred first in holding that Southwestern Sugar and Molasses Co., Inc., had any interest in the barge which entitled it to maintain a libel for damage to it; second, in holding that in the

[1] 46 U.S.C. 192, Act of February 13, 1893, c. 105, § 3, 27 Stat. 445.

[2] The assignments of error are incorporated in the record, R. 361, and are reproduced in the Appendix, *infra*, p. 11.

movement of the molasses from Reserve, Louisiana, to Texas City, Texas, the River Terminals Corporation had been guilty of negligent towage; third, in failing to give effect to Section 3 of the Harter Act and not exonerating River Terminals Corporation; and, fourth, in failing to give effect to the exculpatory provisions incorporated in the tariff of River Terminals Corporation and to the terms and conditions of its bill of lading issued for this movement.

The Court of Appeals did not pass on the merits of this controversy,[3] but, holding that the Interstate Commerce Commission had the primary jurisdiction to determine the validity of the exculpatory clauses contained in the tariff which River Terminals Corporation had filed with the Interstate Commerce Commission, remanded the case to the District Court "in order to afford the appellee reasonable opportunity to seek administrative action before the [Interstate Commerce] Commission to test the validity of the challenged provision, otherwise to give full effect to the exculpatory clause and for further proceedings not inconsistent with this opinion".[4]

It is this decree of the Court of Appeals which the petitioner, Southwestern Sugar and Molasses Co., Inc., seeks to have reviewed by Your Honors on writ of certiorari.

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[3] "The libelee asserted a defense which, if available to it, makes unnecessary consideration of the case on the merits. This defense is: Appellant was a certificated common carrier under the terms of Part III of the Interstate Commerce Act, 49 U.S.C.A. § 901 *et seq.*, which was required to, and which did, file tariff schedules with the Interstate Commerce Commission, and all of whose movements of cargo must be in accordance with its certificate and must, under the statute, conform to its filed tariffs, and that the tariffs applicable to this movement relieved it from all liability for negligence or otherwise." 253 F. 2d 924.

[4] 253 F. 2d 928.

REASONS FOR REFUSING THE WRIT

(1)

It has long been the policy of this Court not to review an interlocutory decree of a Court of Appeals, particularly where that decree does not dispose of the merits of the controversy. *Hamilton Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 36 S. Ct. 269; *John Simmons Co. v. Grier Bros. Co.*, 258 U.S. 82, 42 S. Ct. 196.[5] The fact that the Court of Appeals has not passed upon the merits of this controversy but has simply remanded the case to the District Court to make it possible for the Interstate Commerce Commission to pass upon the validity of the exculpatory clauses embodied in the tariff on file with it, is in itself sufficient ground for denying the petition for the issuance of a writ of certiorari. To grant a writ of certiorari at this stage of the proceedings and before the Court of Appeals has passed upon the merits of this controversy and the issues tendered by the River Terminals Corporation's first three assignments of error filed in the Court of Appeals, might well result in piecemeal consideration of this litigation by Your Honors, should it develop that at a later stage Your Honors' consideration of some other issue is required.

(2)

The petitioner, Southwestern Sugar and Molasses Co., Inc., complains that the decree which the Court of Appeals rendered in this case is contrary to that which it had rendered in *Mississippi Valley Barge Line Company v. T. L. James & Co., Inc., et al*, 244 F. 2d 263, in which Your Honors denied an application for a writ of certiorari.[6] That case, too, is at an intermediate stage.

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[5] "Peradventure the very fact that a final decree had not yet been entered might have been deemed a sufficient ground for refusing the writ." *John Simmons Co. v. Grier Bros. Co.*, *supra*.

[6] Petition for writ, p. 6.

The Court of Appeals had before it only an interlocutory decree of the District Court, which it affirmed on grounds which are clearly at variance with the grounds for its decision in the case at bar. When a panel of the Court of Appeals, two members of which differed from those that had decided *Mississippi Valley Barge Line Company —T. L. James*, had handed down its opinion in the case at bar, an application was delivered to the Clerk of the Court of Appeals in *Mississippi Valley Barge Line Company—T. L. James* either (a) to reconsider that case and render a judgment consonant with the one rendered in the case at bar, or (b) to grant leave to Mississippi Valley Barge Line Company to file a petition for a rehearing and a brief in support thereof, or (c) to grant leave to Mississippi Valley Barge Line Company to file in the District Court a "bill of review" or "libel of review". The Court of Appeals, taking cognizance of the fact that the appeal from the District Court was from an interlocutory decree only and that the matter is now pending in the District Court with no final decree rendered, denied leave to file the application of Mississippi Valley Barge Line Company, saying that inasmuch as "the cause is pending in the district court for final decision and on an appeal therefrom, this court has power to, and will, if then of the opinion it should do so, reverse its former decision and judgment and decide the cause as to it may then seem just and right, *Seagraves v. Wallace*, 69 F(2) 163 * * * ".[1]

We submit that because of the doubt which the United States Court of Appeals for the Fifth Circuit has cast on the correctness of its decision in *Mississippi Valley Barge Line Company—T. L. James*, that case does not constitute binding authority, and until the Court of

[1] The memorandum opinion of the United States Court of Appeals for the Fifth Circuit is reproduced in its entirety in the Appendix, *infra*, p. 12.

Appeals has again reviewed that case, to review the case at bar because it is at variance with *Mississippi Valley Barge Line Company—T. L. James* appears highly illogical.

Even were *Mississippi Valley Barge Line Company—T. L. James* final, that would not constitute such ground for Your Honors' granting a writ of certiorari as would exist were there a conflict between Courts of Appeal of two different circuits.[8]

(3)

It is quite obvious that the risk of loss of and damage to a vessel and cargo is of prime importance in fixing the rate to be charged for transporting them, whether the transportation be affreightment or towage. Risks of loss and damage to vessels and cargoes appear to be inevitably connected with marine transportation, and for more than two and a half centuries the practice has been prevalent of insuring against them. Procurement of such insurance entails the payment of premiums, and where the premiums are paid by the carrier they constitute an item of transportation cost. No carrier by water can be expected to transport a shipment where that carrier is subject to the risks of loss and damage for a rate at as low a level as it would charge if it were not subject to such risks, because in many instances if the marine insurance premium were added to the carrier's other costs for performing the transportation service the carrier's charge therefor to the shipper would be exceeded.

Accordingly, it must be presumed that in fixing or approving a water transportation rate the Interstate Commerce Commission must take into consideration the

[8] Such as contemplated by Supreme Court Rule 19.1(b).

expense of the marine insurance; and where the rate does not include anything for marine insurance to be procured by the carrier, then relieve the carrier of any risk for loss and damage to the vessel and cargo. On the contrary, where the risk of loss and damage to the vessel and cargo is to be the carrier's, then the Interstate Commerce Commission doubtless will fix the rate high enough to include the insurance premium as an item of cost.

However, all of these are matters for consideration by the Interstate Commerce Commission, and not by the Courts, and in the case at bar the Court of Appeals has properly so held, saying that Congress has entrusted the Interstate Commerce Commission with "the devising and controlling of a regulatory scheme over the use of water carriers in foreign and domestic commerce." [9] This holding, of course, follows Your Honors' decisions in *Lowden v. Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516, 59 S. Ct. 612; *General American Tank Car Corp. v. El Dorado Terminal Co.*, 308 U.S. 422, 60 S. Ct. 325; *El Dorado Oil Works, et al. v. United States, et al*, 328 U.S. 12, 66 S. Ct. 843; *Secretary of Agriculture v. United States, et al.*, 350 U.S. 162, 76 S. Ct. 244; *United States v. Western Pacific Railway Co.*, 352 U.S. 59, 77 S. Ct. 161.[10]

Petitioner asserts that the *Bisso* Case [11] is authority for the absolute invalidity of the exculpatory clauses in River Terminals Corporation's tariff; however, as pointed out by the Court of Appeals, that case is not authority and there is no authority for holding invalid *per se* exculpatory clauses embodied in a carrier's tariff

[9] 253 F. 2d 925.

[10] See also *Far East Conference v. United States*, 342 U.S. 570, 72 S. Ct. 492, and *Public Utilities Commission of California v. United States*, ___ U.S. ___, 78 S. Ct. 446.

[11] *Bisso v. Inland Waterways Corporation*, 349 U.S. 85, 75 S. Ct. 629.

filed with and promulgated by the Interstate Commerce Commission.

In the *Bisso* Case there were involved the practices of a private tower not subject to the regulation of the Interstate Commerce Commission, and Your Honors envisaged the possibility of monopolistic practices. Monopoly is, of course, impossible in the case of regulated transportation, whether affreightment or towage. Further, as pointed out by the Court of Appeals, Your Honors in the *Bisso* Case took cognizance that

> "'It may be fairer in the long run to let the tugboat operator free himself (by contract) from his own negligence and transfer the liability to the shippers who employ his services. But the very statement of the problem raises large questions of policy on which the present records throw no light. We would have to know much more about the economics and organization of the tugboat industry than we are offered here to fashion a new rule.' 349 U.S. 85, 97, 75 S. Ct. 629, 636.
>
> "And see the discussion on the public policy aspect of the private towage case at page 117 (dissenting opinion)." [12]

The Interstate Commerce Commission should, and when its attention is properly directed to this issue doubtless will examine into the economics and organization of the towboat industry, and if it is dissatisfied with the practices which the certificated carriers by water have been indulging in for many years based on the provisions of their Interstate Commerce Commission tariffs, the Commission will provide a scheme for the transportation of vessels and cargoes at rates which will fully protect both shippers and carriers.

We submit that the issues of risks of loss of and

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[12] 253 F. 2d 926, 927.

damage to vessels and cargoes are indivisibly tied in with the level of rates to be fixed by the Interstate Commerce Commission as provided by Part III of the Interstate Commerce Act, and in determining that the validity of the exculpatory clauses in the respondent's tariff should be determined by the Interstate Commerce Commission in the first instance, the Court of Appeals has correctly disposed of that portion of this litigation.

CONCLUSION

We therefore submit that the petition for the issuance of a writ of certiorari should be denied in the present posture of this litigation, firstly because the Court of Appeals has not passed upon the merits of this controversy and the decree sought to be reviewed is interlocutory only; and secondly, because the Court of Appeals has correctly decided the one issue on which it has finally passed and there is no contrary final authoritative decision on this issue either in the Fifth Circuit or in any other circuit.

Respectfully submitted,

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APPENDIX

Assignments of Error Filed in the Court of Appeals

1. The Court erred in holding that the libellant, Southwestern Sugar and Molasses Company (Inc.), has any interest in the Barge PETER B which entitled it to maintain a libel for damage to the barge.

2. The Court erred in holding that in the movement of the Barge PETER B with a cargo of molasses therein from Reserve, Louisiana, to Texas City, Texas, the respondent, River Terminals Corporation, was guilty of negligent towage.

3. The Court erred in failing to give effect to Section 3 of the Harter Act and failing to exonerate River Terminals Corporation.

4. The Court erred in failing to give effect to the tariffs of River Terminals Corporation and to the terms and conditions of the bill of lading issued by River Terminals Corporation and delivered to Southwestern Sugar and Molasses Company (Inc.).

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16,469

MISSISSIPPI VALLEY BARGE LINE COMPANY,
Appellant,

versus

T. L. JAMES & CO., INC., ET AL.,
Appellees.

On Petition for Leave to file a Motion for
Extraordinary Relief.

(June 6, 1958)

Before HUTCHESON, Chief Judge, and BORAH and TUTTLE, Circuit Judges.

PER CURIAM:

Suggesting that by its opinion in *River Terminals Corporation v. Southwestern Sugar & Molasses Co.*, ___ F (2) ____,[13] this court has reached an opinion contrary to the result heretofore reached in this case, movant has filed a petition in this cause for leave to file a motion seeking extraordinary relief, wherein, asking the court "to recall its mandate herein to the district court and, in the court's discretion, either:

"A. consider this case and render a judgment consonant with the one rendered in the

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[13] 253 F. 2d 922.

River Terminals Corporation—Southwestern Sugar & Molasses Company case, reversing the interlocutory decree of the District Court and ordering this case remanded to the District Court in order to afford the appellees herein reasonable opportunity to seek administrative action before the Interstate Commerce Commission to test the validity of the exculpatory provisions in the tariff of Mississippi Valley Barge Line Company, or otherwise to give full effect to the exculpatory clauses; or, alternatively,

"B. pursuant to Rule 29 of the Court's rules, grant leave to file a petition for rehearing and a brief in support thereof; or, alternatively,

"C. grant leave to mover to file in the District Court a 'bill of review' or 'libel of review'."

Upon consideration thereof, it is ORDERED that, for the reason pointed out in petitioner's motion, that the cause is pending in the district court for final decision and on an appeal therefrom, this court has power to, and will, if then of the opinion it should do so, reverse its former decision and judgment and decide the cause as to it may then seem just and right, *Seagraves v. Wallace*, 69 F (2) 163, and resort to extraordinary relief is unnecessary, the leave to file be, and the same is hereby DENIED, and the clerk is directed to return to the sender the petition for leave to file and the attached and accompanying papers.

MOTION FILED NOV 1 1958

Supreme Court of the United States

OCTOBER TERM, 1958

No. 135

SOUTHWESTERN SUGAR AND MOLASSES CO., INC.,
Petitioner,

versus

RIVER TERMINALS CORPORATION,
Respondent.

MOTION OF T. L. JAMES & CO., INC., ET AL., FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE.

Supreme Court of the United States

OCTOBER TERM, 1958

No. 155

SOUTHWESTERN SUGAR AND MOLASSES CO., INC.,
Petitioner,

versus

RIVER TERMINALS CORPORATION,
Respondent.

MOTION OF T. L. JAMES & CO., INC., ET AL., FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE.

May It Please the Court:

T. L. James & Co., Inc., and Brown & Root, Inc., d/b/a Louisiana Bridge Company, and T. L. James & Co., Inc., individually, respectfully move for leave to file a brief as *amici curiae* in this case. The consent of the attorney for Petitioner, Southwestern Sugar and Molasses Co., Inc., has been obtained. The consent of the attorney for the Respondent, River Terminals Corporation, was requested but was refused.

The interest of Movers in this case arises from the fact that they were the successful parties in the cases of *Mississippi Valley Barge Line Company v. T. L. James & Co., Inc., et al.*, in the Court of Appeals for the Fifth Circuit Nos. 16,469 & 16,470, decided on May 3, 1957, rehearing denied June 25, 1957, reported at 244 F. 2d 263, in which Writs of Certiorari to this Honorable

Court were refused by order dated November 12, 1957, in the matter entitled *Mississippi Valley Barge Line Company v. T. L. James & Co., Inc., et al.*, No. 446 on the Docket for the October Term 1957, 355 U.S. 871. In these cases the Court of Appeals for the Fifth Circuit decided the question of law involved exactly contrary to its decision in the case of *Southwestern Sugar and Molasses Co., Inc., v. River Terminals Corporation*, under review herein, as is shown by the opinion of the said Court of Appeals dated April 9, 1958, in Case No. 16,699, reported at 253 F. 2d. 922, at page 924. We assume that one of the cogent reasons this Court granted Writs of Certiorari herein was because of such conflicting decisions of the Court of Appeals for the Fifth Circuit.

At the time the decision of the Court of Appeals for the Fifth Circuit in the instant case of *Southwestern Sugar and Molasses Co., Inc.*, was rendered there was an interlocutory decree in admiralty in favor of T. L. James & Co., Inc., et al., against Mississippi Valley Barge Line Company for damages and there remained only a question of proof of the *quantum* of damages. Now in this same T. L. James case, No. 466, October Term 1957, notwithstanding this Court has already denied Writs of Certiorari to Mississippi Valley Barge Line Company, that Company has filed in this Court on or about October 22, 1958, a motion for leave to file an attached petition for rehearing of this Court's order dated November 12, 1957, denying its said petition for Writs of Certiorari therein. Consequently, this is not the ordinary case where an Amicus Curiae has merely a general interest in the legal questions and the decision of a case, for here Mover's opponents are trying to use as a wedge this contrary decision in the Southwestern Sugar and Molasses case to reopen and reverse the favorable decrees in Mover's own cases.

In the instant case, in the Court of Appeals and in its petition to this Court for Writs of Certiorari, Petitioner argued primarily that the release of liability provisions contained in the tariff of the River Terminals Corporation, Respondent herein, which are similar to the release of liability provisions in the tariff of the Mississippi Valley Barge Line Company involved and declared invalid by the Court of Appeals for the Fifth Circuit in the T. L. James & Co., Inc., et al., suit, *supra*, were void and illegal under the decision of this Court in the case of *Bisso v. Inland Waterways Corporation*, 349 U.S. 85, 75 S. Ct., 629 (1955). However, Petitioner failed to stress the importance and controlling effect of the decision in *Cornell Steamboat Co. v. United States*, 321 U.S. 634, 64 S. Ct. 768 (1944), where, taking cognizance of the pertinent language of the Interstate Commerce Act (Transportation Act of 1940), 49 U.S.C. Sec. 920(d), itself, this Court held that, although certificated companies engaged in what was towage were subject to regulation under the Act, it was not the intent of Congress to disturb the rules governing liability of vessels or their owners for loss or damage to vessels in tow or cargo laden thereon.

Petitioner further failed to stress the fact that the case relied upon by the Court of Appeals for the Fifth Circuit in its decision under review here of *United States v. Western Pacific Railroad Company*, 352 U.S. 59, 77 S. Ct. 161 (1956) and similar decisions of this Court, involved questions concerning tariff classifications and rates and did not involve similar release of liability agreements in tariffs filed with the Interstate Commerce Commission and which agreements on their face conflict with such decisions of this Court as *Bisso v. Inland Waterways Corporation, supra.* Petitioner likewise failed to argue and to stress that this Court has repeatedly

held it has authority, and is the proper tribunal, to construe and declare invalid provisions contained in tariffs filed with the Interstate Commerce Commission without the necessity of the litigant resorting first for a remedy to the Commission. See, *St. Louis, Iron Mountain & Southern Railway Co. v. Hasty & Sons*, 255 U.S. 252, 41 S. Ct. 269 (1921); *Great Northern Railway Company v. Merchants Elevator Company*, 259 U.S. 285, 42 S. Ct. 477 (1922), and the expression of this Court at page 69 in *United States v. Western Pacific Railroad Company, supra.*

Since it is likely that Petitioner may fail to raise and stress these questions in its brief and argument on the merits before this Court, it is believed that the brief which Movers are requesting permission to file as Amici Curiae will contain a more complete argument thereon. If this argument is accepted it will be dispositive finally of both of these cases decided by the Court of Appeals for the Fifth Circuit, just as it was originally accepted and disposed of Movers' cases of *Mississippi Valley Barge Line Company v. T. L. James & Co., Inc., et al., supra.*

Respectfully submitted,

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Office-Supreme Court, U.S.
FILED
NOV 12 1958
JAMES R. BROWNING, Clerk

Supreme Court of the United States

OCTOBER TERM, 1958

No. 155

SOUTHWESTERN SUGAR AND MOLASSES CO., INC.,
Petitioner,

versus

RIVER TERMINALS CORPORATION,
Respondent.

OBJECTION OF RIVER TERMINALS CORPORATION, RESPONDENT, TO MOTION OF T. L. JAMES & CO., INC., ET AL., FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE*.

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Supreme Court of the United States

OCTOBER TERM, 1958

No. 155

SOUTHWESTERN SUGAR AND MOLASSES CO., INC.,
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Respondent.

OBJECTION OF RIVER TERMINALS CORPORATION, RESPONDENT, TO MOTION OF T. L. JAMES & CO., INC., ET AL., FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE*.

May It Please The Court:

Respondent, River Terminals Corporation, is filing this objection to the motion of T. L. James & Co., Inc., et al., for leave to file a brief as *amici curiae* in this case in order to reiterate and record the reason which it has heretofore given to movants' attorney for withholding its consent to such filing.

The movants here are the respondents in th matter entitled *Mississippi Valley Barge Line Company, Petitioner, v. T. L. James & Co., Inc., et al., Respondents*, No. 446, October Term, 1957, of the docket of this Court, which is now pending on motion for leave to file a petition for rehearing of Your Honors' denial of a petition for writ of certiorari to the United States Court of

Appeals for the Fifth Circuit. This rehearing is being sought on the ground that both that case and the one at bar present similar and related questions of law which have been determined contradictorily by the Court of Appeals. That such a situation exists is unequivocally and unreservedly stated by the attorney for movants in their motion for leave to file a brief as *amici curiae* herein, and yet they are opposing the motion for leave to file a petition for rehearing and the petition for rehearing in *Mississippi Valley Barge Line Company—T. L. James & Co., Inc., et al.* In short, the attorney for movants wants to be heard on the questions involved in and material to those cases in the case at bar, but not in his own cases. He wants to fight his battle on somebody else's battleground, but not on his own battleground.

We have advised the attorney for movants that we consider it entirely unreasonable for him to ask consent to file a brief for *amici curiae* herein to discuss the legal questions involved in *Mississippi Valley Barge Line Company—T. L. James & Co., Inc., et al.*, while at the same time opposing having Your Honors review those cases. We reiterate that objection and record it herewith.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1958

No. 155

SOUTHWESTERN SUGAR AND MOLASSES CO., INC.,
Petitioner,

versus

RIVER TERMINALS CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ORIGINAL BRIEF ON BEHALF OF SOUTHWESTERN SUGAR AND MOLASSES CO., INC., PETITIONER

AMOS L. PONDER, JR.
P. M. FLANAGAN
OF COUNSEL

CLEM H. SEHRT
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OPINIONS BELOW

The findings of fact and conclusions of law are in the record (R 261). The opinion of the Court of Appeals is in the record (R 269).

JURISDICTION

Jurisdiction to review this case upon Writ of Certiorari is based on 28 U. S. Code 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

1.

Whether River Terminals Corporation can escape liability for its negligence because of the tariff filed with the Interstate Commerce Commission containing the following provisions:

> "When shipments are transported in barges furnished by owners, shippers, consignees or parties other than the carrier, such barges and (or) cargoes will be handled at owner's risk only, whether the loss or damage is caused by negligence or otherwise."

2.

Whether a tower can incorporate in its tariff an exculpatory clause releasing it from liability and from the consequences of its own negligence when this Court has held such release from negligence clauses as void and against

public policy in Bisso vs. Inland Waterways Corporation 349 U.S. 85, 75 S. Ct. 629 (1955).

3.

Whether the Courts and not the Interstate Commerce Commission, as Respondent contends, are the proper forums for determining whether release from liability clauses are void as contrary to public policy.

STATEMENT OF THE CASE

Petitioner instituted suit in the United States District Court for the Eastern District of Louisiana against River Terminals Corporation for damages to the Barge Peter B and loss of a cargo of molasses laden therein. The libel claimed, and the trial court found, that the barge sank and its cargo was lost as a result of negligent acts of River Terminals Corporation in navigation or management of the tow (R 367).

The Court of Appeals did not consider the case on the merits as Respondent had asserted a defense, which they held, if available to Respondent, would make it unnecessary to consider the case on the merits. The defense was that Respondent was a certificated common carrier under the terms of Part III of the Interstate Commerce Act, U.S.C.A. 901 et. seg., and was requested to, and did, file tariff schedules with the Interstate Commerce Commission and that the tariff applicable to this movement relieved it from all liability for negligence or otherwise, the pertinent part as follows:

> "When shipments are transported in barges furnished by owner, shippers, consignees or parties other than the carrier, such barges and (or) cargoes will be handled at owner's risk only, whether the loss or damage is caused by negligence or otherwise."

The Court of Appeals went on to say:

> "As to whether the quoted provision of the tariff is void as against Public Policy we must at once recognize that in the recent case of Mississippi Valley Barge Line Company v. T. L. James & Co., Inc., et al, 5 Cir., 244 F. 2d 263, we held such a provision void and of no effect."

The Court stated that in the Mississippi Valley case, supra, the issues were identical to this case. This Court in the Mississippi Valley case held that this identical provision was void and of no effect citing Bisso vs. Inland Waterways Corp., 349 U.S. 85, stating as follows:

> "It is sufficient to say that the validity of this claim has been definitely and conclusively settled against it in the Bisso case, and that, as pointed out in the opinion of the district judge below and in the brief of the appellees here, the fact that this illegal clause is embodied in a tariff cannot make it legal."

In the instant case the Court stated that if they had incorrectly stated the law previously it was their duty to proceed in this cause as they believed the law required.

The Court of Appeal reversed and remanded the trial court in order to afford the appellee reasonable opportunity to seek administrative action before the Interstate Commerce Commission to test the validity of this exculpatory clause, otherwise to give full effect to the exculpatory clause.

Briefly the facts that were developed at the time of trial were as follows:

Between September 17 and September 22, 1944, the loaded steel molasses tank barge called the PETER B was towed by respondent's[1] tugs from Reserve, La. to libellant's[2] terminal at Texas City, Texas, under an oral towage contract.

The PETER B consistently lost trim during the course of the towage because of a leak in her No. 2 forward tank, starboard side, with the result that at the time she was moored at Southwestern's terminal, Texas City, Texas, on the night of September 22-23, 1944, the barge had completely lost trim, her leading starboard corner being at the water's edge.

The PETER B subsequently sank (under the circumstances developed at the trial) during the early morning hours of Sunday, September 24, 1944. As a result of the sinking, her molasses cargo became a total loss, except for the salvage of a relatively small amount. The barge was subsequently raised, repaired and returned to service.

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[1]Hereafter termed "R.T.C.".
[2]Hereafter termed "SOUTHWESTERN."

The libel herein was filed by Southwestern against R.T.C. to recover on its own behalf, as owner of the cargo, and as bailee or charterer on behalf of International Transportation Corporation,[3] owner of the PETER B to recover for the damage sustained by both the cargo and the barge. The amount claimed in the libel is $44,000.14, together with the interest, etc.

Southwestern asserts that the loss and damage was the proximate result of fault on the part of R.T.C. (and the towing tugs) in that, notwithstanding specific knowledge that the barge was leaking:

(1) It failed to sound and pump the barge when her loss of freeboard forward, while en route from Reserve, La., made it apparent that she was taking water in either the forward rake or the No. 2 cargo tank, or both;

(2) It moored the PETER B forward end out, i.e., with the forward starboard corner (which was at the water line) exposed to the wind and waves, and the wash of vessels passing across the end of the slip;

(3) It moored the PETER B in a deep water slipway, in exposed condition, when the barge could and should have been moored in shallow water or beached on a flat (Snake Island) a relatively short distance off the end of the slipway; and

(4) By assuring a clerical employee of Southwestern, who was totally unfamiliar with marine equipment, that

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[3]Hereafter termed "INTERNATIONAL."

the PETER B was in safe condition and required no attention when it knew in fact that the barge, at the time it was moored on the night of September 22-23, 1944 and thereafter, was in a dangerous, leaking and exposed condition, and when it also knew that there was no person available at the Southwestern terminal capable of exercising any judgment as to the actual condition of such barge.

By its answer, R. T. C. asserts, in substance, that when the PETER B was berthed at Texas City, it was not out of trim nor in a dangerous or leaky condition and that the sinking therefore was not the result of any negligence on its part. It affirmatively alleges that, notwithstanding the fact that the towage contract was verbal and that the bill of lading issued by R. T. C. contained no reference thereto, the towage of the barge and cargo was subject to the provisions of a certain tariff filed with the Interstate Commerce Commission, Washington, D. C., which tariff, among other things, provided:

> "When shipments are transported in barges furnished by owners, shippers, consignees or parties other than the carrier * * * such barges and (or) cargoes will be handled at owner's risk only, whether the loss or damage is caused by negligence or otherwise * * *. Presentation of a shipment in a barge furnished by the shipper * * * shall constitute a guarantee * * * that the barge is seaworthy." (Ans. Art. 24)

Two witnesses having knowledge of the facts were produced by Southwestern and testified at the trial, namely,

SUBJECT INDEX

	Page
I. Opinions Below	2
II. Jurisdiction	2
III. Questions Presented for Review	2
IV. Statement of the Case	3
V. Argument	19
VI. Conclusion	42
Certificate	44

TABLE OF AUTHORITIES

Cases Cited

Bisso vs. Inland Waterways Corporation, 349 U.S. 85, 75 S. Ct. 629 (1955)	3
Conners-Standard Marine Corp. vs. Marine Fuel Transfer Corp. (E.D.N.Y.) 1955 A.M.C. 1759	19
Cornell Steamboat Co. Contract Carrier Application, 250 I.C.C. 301 (1942)	32
Cornell Steamboat Co. vs. United States, 53 Fed. Supp. 349 (D.C.N.Y.) (1943)	34
Cornell Steamboat Co. vs. United States, 321 U.S. 634, 88 L. Ed. 978, 64 S. Ct. 768 (1944)	35
Curtis Bay Towing Co. of Va., Inc., vs. Southern Lighterage Corp., (4 CCA) 200 F. 2d 33	26
Dwyer Lighterage Co. vs. Christie Scow Corp. (E.D.N.Y.) 96 Fed. Supp. 903	28

AUTHORITIES — *(Continued)*

Page

Foss Launch & Tug Co. vs. The Kukkui (N.D. Cal.) 130 Fed. Supp. 180 28

F. E. Grauwiller Trans. Co., Inc. vs. Exner Sand & Gravel Corp. (2 CCA) 162 F. 2d 90 25

George Leary, Jr. vs. The City of New York, (E.D.N.Y.) 1945 A.M.C. 598 22

Henry Du Bois Sons Co. vs. Penn. R. Co., (2d Cir.) 47 F. 2d 172 22

Howard vs. Dobbins-Trinity Coal Co. Inc., (2 CCA) 111 F. 2d 571 19

Ideal Cement Co. v. The Tickfaw, 143 Fed. Supp. 904 (E.D. La.) (1956) 38

In Re Wright & Cobb Lighterage Co., Inc., (S.D.N.Y.) 42 Fed. 2d 480 20

Mississippi Valley Barge Line Company vs. T. L. James & Co., Inc., et al, 5 Cir. 244 F. 2d. 263 42

Moran Transportation Corp. vs. Lehegh Valley R.R. Co. et al, (S.D.N.Y.) 126 F. Supp. 122. 19

O'Donnell Transportation Corporation, Inc. vs. M. & J. Tracy (2 CCA) 150 Fed. 2d 735 20

Petition of Reliance Marine Trans. Co., 89 Fed. Supp. 272 (D.C. Conn.) (1950) 37

Seaboard Sand & Gravel Corp. vs. Moran Towing Corp., 154 Fed. 2d 399 19

The Frank A. Smith Norris Grain Co. vs. Ryan et al, (E.D.N.Y.) 8 Fed. Supp. 134 19

AUTHORITIES — *(Continued)*

	Page
The Guiding Star vs. Jennie F., (E.D.N.Y.) 1929 A.M.C. 155	22
The Mack et al (E.D.N.Y.) 18 Fed. Supp. 69	28
The New York (E.D.N.Y.) 93 Fed. 495, 498	22
The W. C. Block, The Wilson P. Foss (2 CCA) 71 Fed. 2d 682	20
Thorne, Neale & Co., Inc. vs. Reading Co., (2 CCA) 87 F. 2d 694	24
United States vs. Shea, 152 U.S. 178, 186	20

Statutory Authorities

Harter Act, Sec. III. 46 U.S.C. 190-196	35
Transportation Act of 1940, 49 U.S.C. Sec. 901 et seq:	35

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 155

SOUTHWESTERN SUGAR AND MOLASSES CO., INC.,
Petitioner,

versus

RIVER TERMINALS CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

MAY IT PLEASE THE COURT:

The United States District Court for the Eastern District of Louisiana entered an interlocutory decree decreeing River Terminals Corporation liable as a tower to Southwestern Sugar and Molasses Co., Inc., for damages to the Barge, Peter B, and a cargo of molasses laden therein; on appeal the United States Court of Appeal for the Fifth Circuit reversed the decree of the lower Court and remanded the case for further proceedings; an application for a Writ of Certiorari was filed by petitioner on July 7, 1958 and granted on October 13, 1958.

During September, 1944, and for some time prior thereto, Southwestern operated the barge PETER B under charter from International, the terms of hire being for an indefinite period at a stipulated rate, with Southwestern obligated to provide maintenance and such repairs as may be required during the course of the charter.

In the fourth paragraph of the libel, which was affirmed under oath by A. I. Kaplan, President, it was alleged that; libellant as charterer and bailee of said barge was required to keep the barge in repair, and at the termination of said charter party to return the barge to its owner in the same good order and condition as received, ordinary wear and tear excepted, and to pay for any damages sustained by said barge PETER B while used by the charterer under said charter party.

R. T. C. addressed interrogatories to libellant which were answered by Mr. A. I. Kaplan (R 44) as follows:

> "He does know that the barge was under charter to libellant from the International Transportation Corporation during the month of September, 1944, and long prior thereto, as alleged in the libel and to which he affirmed under oath in September, 1945."

Libellant has shown that it did have an interest in the barge PETER B by this and the testimony of Mr. Frieler at the time of trial. (R 65, 66)

Mr. L. H. Frieler, Manager of libellant's terminal, and Mrs. W. White, former clerical employee of Southwestern. The testimony of other witnesses for libellant was taken by deposition.

Testimony on behalf of respondent was entirely by deposition.

The bill of lading covering the transportation, the dimensions and physical details of the PETER B and of the towing tugs, and other pertinent matters were either stipulated during the pendency of the suit or at the trial.

In 1944 and for some years prior thereto, Southwestern owned and operated a molasses terminal at Texas City, Texas, used for the purpose of berthing barges, a deep water slip, owned by the Port of Texas City, known as "Pier C." The slipway opened up on the main ship channel between Galveston and Texas City, Texas.

The PETER B may be briefly described as a steel tank barge approximately 175 ft. long, 26 ft. wide, and 11 ft. deep. The barge has eleven tanks, three of which were small round cylindrical tanks set in rotation in the center of the barge, the other eight tanks being rectangular in shape — four being located on each side of the barge and being numbered from forward to aft. The No. 1 tank thus was the forward tank on the port side and the No. 2 tank the forward tank on the starboard side of the barge immediately aft of the rake. The barge had two dry compartments or rakes, one forward and one aft, the aft rake containing a small pump house equipped with a gasoline-driven cargo pump.

The PETER B, while in Southwestern's custody, had been certified for use in the molasses trade and was operated exclusively in the molasses trade, having made twelve or thirteen trips with molasses between Reserve, La. and Texas City, Texas, via the Intracostal waterway. R. T. C. towed the barge on each occasion prior to the trip in question.

On such previous trips, the vessel, when fully loaded, carried about 155,000 gallons of molasses and, while a greater quantity of molasses was carried in the cargo tanks aft and midship, approximately 5-1/2 feet of cargo was carried in the forward tanks No. 1 and 2. Fully loaded, the PETER B had a normal freeboard of approximately 3 ft. 2 in. forward and 2 ft. 6 in. aft.

On Saturday, September 16, 1944, the PETER B, having been towed light from Texas City, by R. T. C., was tendered to the Godchaux Sugar Refinery, Reserve, La. for the loading of a further cargo of blackstrap molasses. Loading was commenced on that day under the supervision of Mr. L. H. Frieler, Manager of Southwestern's terminal at Texas City, who had proceeded to Reserve, La. for such purpose. Loading proceeded in the usual manner, namely, cargo was pumped into the vessel's cylindrical tanks and into the rectangular tanks from aft to forward. As loading was nearing completion, and when about one foot of cargo had been loaded into the two forward tanks, namely, Tank No. 1 and tank No. 2 respectively, a cracking or sizzling noise was heard coming from the No. 2 cargo tank.

Loading was immediately stopped and inspection made to determine the cause of the noise. A crack variously estimat-

ed to be from 6 to 8 inches in length and located approximately 80-1/2 inches from the top of the cargo tank, was found in the No. 2 cargo tank. Further cargo was therefore placed into either the No. 1 or the No. 2 tanks of the vessel. Gauge readings, subsequently taken jointly with the shipper, disclosed the PETER B to have loaded approximately 140,158 gallons (as distinguished from her normal cargo of approximately 155,000 gallons) on board.

Frieler tried to notify R. T. C.'s New Orleans office about the leak in the No. 2 tank but was unable to do so since it was late Saturday evening (September 16) when the incident occurred and the R. T. C. office was apparently closed. Frieler thereupon returned to New Orleans, and the following morning (Sunday), September 17, 1944, again attempted to call R. T. C. but was again unsuccessful. He therefore returned to Reserve, La. and found that the barge had been towed out from the dock early in the morning and prior to his arrival. (R 79). Being concerned about the leak, Frieler then proceeded to Houston, Texas (rather than to Texas City), stayed over-night, and the following morning, Monday, September 17, called in person at the R. T. C. office in Houston (R 82, 83).

Frieler conferred with Mr. Hinkle, General Agent of R. T. C. at Houston, Texas, advising Mr. Hinkle as to the leak in the No. 2 tank of the barge and of his (Frieler's) concern that the towing tugs would keep the barge under close observation during the course of the trip to Texas City. Hinkle told Frieler not to be alarmed and that there was no danger since the tugs had pumps aboard and, further, that in any event, the tow could not be made up at Harvey, La. for a day or two and that the R. T. C. New Or-

leans office would be advised and Frieler kept informed of any unusual incident en route.

Hinkle confirmed the visit and advices by Frieler, although he preferred to base lack of alarm as to the condition of the barge on other grounds, viz:

> "A. I understood the object of his visit was for me to determine whether the barge had become involved in any accident while in our possession.
>
> Q. But also to give you information about the leak?
>
> A. Well, yes, I would say that that was part of the reason that he came.
>
> Q. Do you know now, today, any reason why you should have contacted anyone about a leak in a cargo tank in that barge, from your standpoint as an operating man?
>
> A. No, sir. A leak in a cargo tank is not a matter of any concern, because, as I say, that is what the tank is for, for cargo, whether it be molasses or water or kerosene or petroleum products of any kind." (Dep. Hinkle. R 244)

Frieler thereupon also notified Capt. R. L. Wynne, a surveyor with office at Houston, Texas, as to the leak which had occurred in the No. 2 tank and the fact of possible damage to the cargo. Capt. Wynne requested Frieler not to have the barge discharged except in his presence and a tentative arrangement was made for Capt. Wynne to meet with Frieler and survey the barge and the cargo on Monday, September 25, 1944. A letter from Capt. Wynne

to Frieler confirming this arrangement was thereafter received by Southwestern. (R 249)

On September 21, 1944, i.e., three days after Frieler's advices to both Hinkle and Capt. Wynne of the condition of the barge, he received instructions to proceed to Corpus Christi and McAllen, Texas, in connection with other business of his company. Prior to leaving for Corpus Christi, however, Frieler telephoned Hinkle and again inquired whether he had heard anything as to the condition of the barge. Hinkle stated that he had not and repeated that there was nothing to be alarmed about because the tugs had pumps aboard and would keep the barge under constant observation. Frieler thereupon called Capt. Wynne who came down to Southwestern's terminal and discussed the matter again with Frieler in the presence of Mrs. White (then Miss Wertenberger). Frieler advised Capt. Wynne that he had talked again with Mr. Hinkle and that apparently the barge was all right, whereupon Capt. Wynne again stated that the barge was not to be discharged unless he (Wynne) was in attendance Frieler thereupon, in Wynne's presence, so stated to Mrs. White and departed for Corpus Christi and McAllen the same afternoon of September 21, 1944.

It appears from the depositions subsequently taken on behalf of R. T. C. and from answers to interrogatories made herein that, in making the trip from Reserve, La. to Texas City, Texas, the tow traversed the following route, viz., the Mississippi River from Reserve, La. to the Harvey Locks at Harvey, La.; through the Harvey Locks; then via the Intra-costal waterway through the Vermillion Locks to Port Arthur, Texas; thence to Galveston Bay, Texas, and

across Galveston Bay to Texas City, Texas. (Ans. R 19, 20). It further appears that the PETER B was towed from Reserve, La. to Harvey, La. by the tug JOHN M; from Harvey, La., to Port Arthur, Texas, by the tug SAMBO; and from Port Arthur, Texas, to Texas City, Texas, by the tug DOTTIE D. (R 19, 20)

The PETER B apparently maintained her trim through the Harvey Locks, and the lock tender's record disclosing her mesne draft then to be 6 ft. On arrival at the Vermillion Locks, however, it was evident that the barge was taking water, since the lock tender's report at such place disclosed her mesne draft to be 8 ft.

In any event, when the tow arrived at Port Arthur, Texas, in the charge of the tug SAMBO, the PETER B was badly out of trim, her forward starboard corner having a freeboard of not more than 8 to 9 inches, her freeboard aft remaining approximately the same as when the barge left Reserve, La., i. e., about 2 ft. 5 inches. (R 224, 225, 226)

It is claimed by the captain of the DOTTIE D (Allemand) that because of her bad trim he went aboard the PETER B, removed the manhole covers by unscrewing the bolts and releasing the dogs with his hands, and inspected both the forward and after dry rakes and found both to be empty. (Dep. Allemand R 225). No attempt was made to inspect the No. 2 forward cargo tank or any of the cargo tanks, notwithstanding the fact that the starboard forward corner of the barge had lost most of its freeboard. (Dep. Allemand R 225) Notwithstanding the fact that previous knowledge had been given to Hinkle by Frieler as to the

leak in the No. 2 tank, Allemand did not know the barge had a leak in the No. 2 cargo tank.

"Q. Did you know or had anybody told you that the barge had a hole in her?

A. I didn't know anything about it. Nobody never mentioned anything about it to me."

(Dep. Allemand, R 225)

The tug DOTTIE D thereupon broke the PETER B out of tow, turned her around, made up to the forward end of the barge, and proceeded to push her stern-first across Galveston Bay from Port Arthur, to Texas City, a distance of 60 to 65 miles across open water at a speed in excess of 7 miles per hour. (Dep. Allemand, R 225, 226). This was the first time Allemand had ever seen the PETER B in such condition, and the first time he had towed her on numerous prior occasions. (Dep. Allemand, R 227, 228)

Allemand also claimed that during the course of traversing Galveston Bay, at an average speed of 7 miles an hour, he again boarded the PETER B, again unscrewed the manhole covers to the rakes and again checked them to make sure that they were free of water.

The implausibility of the latter claim seems apparent, when viewed in the light of Frieler's testimony that on previous occasions when the manhole covers leading to the rakes were opened, it was necessary to use a long handled wrench, and the surveyor's reports (introduced in evidence by stipulation at the trial). (R 111, 252)

The Barge PETER B arrived at "Pier 0," Texas City, about midnight, September 22, 1944, and was first berthed across the "Tee" of the Pier outside the slip, the reason being unknown. During the course of the night, for reasons also not explained the DOTTIE DEE pushed the barge into the slip, stern-first, and made her fast, starside to the dock, bow out, in such manner that the forward starboard corner of the barge was next to the Pier. Nobody at the Southwestern terminal was notified of the arrival of the barge.

About 8 o'clock the following morning, Saturday, September 23, 1944, Mrs. White, a clerical assistant to Frieler, was advised by Garcia, a handyman at the plant, that the forward starboard corner of the barge was at the water line and that waves were washing over the deck at that place. Mrs. White went down and viewed the barge and then immediately placed calls both for Capt. Wynne and for the R. T. C. office at Houston. The call went through to the R. T. C. office first, whereupon Mrs. White advised Capt. Stovall of R. T. C., who was in charge of the R. T. C. office at Houston, as to the condition of the barge and inquired specifically whether the barge was in any danger, since Frieler was not available and Capt. Wynne wanted to see the barge prior to the time her cargo was discharged. (R 120, 121, 122, 123, 124)

Mrs. White was quite specific in her testimony at the trial, that she told Capt. Stovall the forward right hand corner of the barge was at the water line, and that waves were washing over it; that she was not familiar with floating equipment; that she had never seen the barge in that condition; that the office would close at 12 o'clock noon; and that she had called because, if there was any

danger, a tug should pump the barge out or otherwise care for it.

Capt. Stovall advised Mrs. White that the master of the tug was then in his office and, after interrogating the master, stated that the rakes of the barge had been examined by the master (Allemand) at the time the PETER B was moored in the slip, and were found dry, and that the barge was in the same condition as when the DOTTIE D took her in tow at Port Arthur. Capt. Stovall assured Mrs. White that there was nothing to be concerned about and that the barge was in no danger of sinking.

Mrs. White, nevertheless, kept her telephone call in for Capt. Wynne's residence at Dickinson, Texas, and succeeded in reaching Capt. Wynne later during the morning of September 23, 1944. She reported to Capt. Wynne what Capt. Stovall had stated; told Capt. Wynne the condition of the barge and inquired whether he would not consider it advisable to go down and look at it. Capt. Wynne concurred with Capt. Stovall that there was no immediate concern and that he would be down on Monday morning (September 25, 1944), as previously arranged with Frieler.

Mrs. White, in reliance upon such advices, did nothing further and left the plant at noon time. The following morning (Sunday, September 24) at about 8 A.M., she received a telephone call from someone at the Pier that the barge was sinking. She immediately went to the plant and on arrival found that the PETER B had sunk by the head in about 30 feet of water, the only portion of the barge above the water being the after cargo tanks No. 10 and No. 11 and the after rake. As Mrs. White put it, only the last

two valves were visible when she saw the barge. She then immediately called Capt. Stovall and Capt. Wynne and, after some delay, succeeded in reaching Capt. Stovall. When told of the condition of the barge, Capt. Stovall then advised Mrs. White to start the pumping on the barge and to keep Capt. Wynne informed. He also agreed to get what equipment he could and move to the barge in an attempt to keep her from further sinking. R. T. C. was apparently unable to get any equipment over to the barge, nor could Mrs. White. Some time later, Capt. Wynne telephoned and when advised of the condition, came down to the terminal, arriving from his residence at Dickinson, Texas, during the course of the late afternoon.

All efforts to pump out the barge or to create enough buoyancy to raise her forward end were unavailing and, although a small amount of cargo was pumped out of the after tanks, only a relatively small amount of salvage, estimated to be between 5,000 and 9,000 gallons, was realized.

The PETER B was subsequently raised, towed to the Houston Iron Works, surveyed and repaired at a cost of approximately $6,380.

During the course of survey, heavy scale was removed from the shell in the way of the No. 2 tank, disclosing numerous small pin holes. One of these pin holes was enlarged several inches in diameter with a chipping hammer, after which photographs of that area were taken by R. T. C. over vigorous protests of Frieler.

ARGUMENT

I.

An oral barge charter requiring the charterer to operate, maintain and repair it at its own expense, is a demise charter. This appears to be so well settled as a matter of law as not to be subject to serious question.

MORAN TRANSPORTATION CORP. V. LEHIGH VALLEY R. R. CO. ET AL. (S.D.N.Y.), 126 Fed. Supp. 122;

HOWARD V. DOBBINS-TRINITY COAL CO. INC. (2 CCA) 111 Fed. (2d) 571;

CONNERS-STANDARD MARINE CORP. ETC. V. MARINE FUEL TRANSFER CORP. ET AL. (E.D.N.Y.) 1955 A.M.C. 1759 (not otherwise reported);

SEABOARD SAND & GRAVEL CORP. V. MORAN TOWING CORPORATION, 154 Fed. (2d) 399;

O'DONNELL TRANSPORTATION CO. INC. V. M. & J. TRACY (2 CCA) 150 Fed. (2d) 735;

THE FRANK A. SMITH. NORRIS GRAIN CO. V. RYAN ET AL. (E.D.N.Y.) 8 Fed. Supp. 134.

II.

Southwestern was therefore owner of the PETER B *pro hac vice.*

CONNERS-STANDARD MARINE CORPQRATION ETC. V. MARINE FUEL TRANSFER CORPORA-

TION ET AL. (E.D.N.Y.) 1955 A.M.C. 1759 (not otherwise reported);
UNITED STATES V. SHEA, 152 U.S. 178, 186;
THE W. C. BLOCK, THE WILSON P. FOSS, (2 CCA) 71 Fed. (2d) 682;
IN RE. WRIGHT & COBB LIGHTERAGE CO. INC., (S.D.N.Y.) 42 Fed. (2d) 480.

and, as such, became liable primarily for any damage sustained by the barge while in its possession as charterer, for the acts of anyone to whom it entrusted the barge or permitted to exercise dominion over it, including the acts of negligence of a tow boat company.

O'DONNELL TRANSPORTATION CO. INC. V. M. & J. TRACY, INC. (2 CCA) 150 Fed. (2d) 735;
CONNERS-STANDARD MARINE CORP. ETC. V. MARINE FUEL TRANSFER CORPORATION ET AL. (E.D.N.Y.) 1955 A.M.C. 1759 (not otherwise reported.)

In *O'DONNELL TRANSPORTATION CO. INC. v. M. & J. TRACY, INC.* (2 CCA) 150 Fed. (2d) 735, the Court of Appeals, per A. N. Hand, C. J., said at page 737:

> " * * * It has long been held that a (demise) charterer of barge who hires a tug to tow it is liable for the negligence of the tug. * * * " (parenthesis supplied)

In *CONNERS-STANDARD MARINE CORP. ETC. v. MARINE FUEL TRANSFER CORP. ET AL.* (E.D.N.Y.)

1955 A.M.C. 1759, Abruzzo, D. J., painstakingly collected the authorities, saying at page 1761:

> "As said by the Circuit Court for this Circuit in O'Donnell Transp. Co. vs. M. & J. Tracy, supra, in affirming a decree of this Court (1945 A.M.C. p. 966, 150 F. (2d) p. 737):
>
> > 'Liability is imposed upon charterers upon the theory that they should at all times care for the barge while she is under charter to them and that they are under a duty which may not be delegated to others. * * * '"

III.

Southwestern could therefore sue as it did herein, in its own name as owner of the cargo and as owner pro hac vice or as bailee for damage sustained by the PETER B as a result of negligence of R. T. C. and/or its tugs.

THE W. C. BLOCK, THE WILSON P. FOSS (2 CCA) 71 Fed. (2d) 682:

> " * * * For centuries it has been the settled rule, both at common law and in the admiralty, that either the bailor (in the present case, the buyer, McNulty), or the bailee (the libellant), might sue the tort feasor for destruction of the bailed goods. * * * " Swan, C. J., (page 683).

GEORGE LEARY, JR. V. THE CITY OF NEW YORK (E.D.N.Y.) 1945 A.M.C. 598 (not otherwise reported):

"The respondent now urges preliminarily that it should be relieved of liability because the libellant was itself merely a charterer. But manifestly the libellant is entitled to maintain suit, since it is a bailee." (p. 599)

THE GUIDING STAR v. JENNIE F. (E.D.N.Y.) 1929 A.M.C. 155 (not otherwise reported); *THE NEW YORK* (E.D.N.Y.) 93 Fed. 495, 498.

IV.

R. T. C., having been placed on notice of the leaking condition of the PETER B, was under the duty to exercise a high degree of care to protect the barge while in its custody and to so moor her that she was in no danger of sinking, or to stand-by and pump as required to prevent her from later sinking, until performance of such duty was excused.

In *HENRY DU BOIS SONS CO. v. PENNSYLVANIA R. CO.* (2d Cir.) 47 F. (2d) 172, 174, the court said:

"When the Mercer took her out of the tow to moor because of her leaking condition, the tug was bound to exercise the skill and care a prudent navigator would employ in like circumstances, for the bailment continued until the service contracted for was performed *or performance excused.* Doherty v. Penn. R. Co. (C.C.A.) 269 F. 959;

The W. H. Baldwin (C.C.A.) 271 F. 411; Maryland Transportation Co. v. Dempsey (C.C.A.) 279 F. 94. The duty the Mercer owed the Margaret G. was not fulfilled by tying her up and leaving her to sink unless reasonable care would not have prevented her sinking at all. So, before we need consider the choice of a berth, we may well inquire whether the Mercer was justified in abandoning the coal boat at any berth.

"*Certainly, abandonment to sink at the pier, before all reasonable efforts to keep her afloat were exhausted, was a breach of duty imposed by law,* The Joseph F. Clinton (C.C.A.) 250 F. 977, and the burden is on the tug to show that no reasonable effort on her part would have kept the coal boat afloat, Appeal of Cahill (C.C.A.) 124 F. 63. As to that the record is silent. We know, however, that water was gaining on the coal boat's pump. This plainly indicated her sinking unless aid was obtained. We know her pump was in the bow, and, of course, grounding her bow had no effect to prevent whatever surplus water came in from running aft, no matter where the leak was located. This put it beyond the reach of the pump, and the stern would inevitably get lower and lower. We know that she remained afloat for over twelve hours. *Had the Mercer stood by and used her syphon, it cannot be taken for granted that the Margaret G. would have gone down, and so it was incumbent upon the tug, the sinking having been proved, to prove that it was not caused by her negligence.*

"It is true that there is no evidence that the Margaret G. was seaworthy when taken in tow or to show what caused the leaking or just when it began. *If it be assumed for the argument, however, that she was unseaworthy when the voyage began, the tug is, nevertheless, liable for any loss attributable solely to its failure to exercise due care to save the boat and cargo from that damage which it could have prevented by taking reasonable and prudent action to protect the boat and cargo from sinking from whatever cause.* McCormick v. Jarrett (D.C.) 37 F. 380. Nor was it shown that the captain of the Margaret G. could have obtained assistance after being moored and abandoned or failed to do all within his power to prevent sinking. On the evidence, the Mercer is responsible for all the damage caused solely by the sinking of the coal boat. (See the M. J. Cummings (D.C.) 18 F. 178; The Jonty Jenks (D.C. 54 F. 1021)"

(Italics ours)

In *THORNE, NEALE & CO. INC. v. READING CO.* (2 CCA) 87 F. (2d) 694, the court said:

" * * * Perhaps it was wrong to leave the barge at the pier at all; She was known to be aleak and it was a bad place if she sank. But since we are holding that the respondent had been assured that the leak could be controlled, we will not charge it for leaving her where she would have been safe, if she had been properly pumped. But when Coll and Grimes went to look at her, just before Burton returned, it could only have been because they

were uneasy about her safety. Grimes went aboard and if he did not see that she had four or more feet of water in her, he should have done so, because that was the case. True, they said that they thought she was then apparently not in danger, but — quite apart from the contradiction of this by three witnesses — if one pump had failed to hold down the water, they should not have assumed that two would necessarily be enough. She did not sink until four hours later, and during all that time they entirely neglected her. If she was too fast aground to move, as they said, they could have pumped her out with a tug's siphon, and then pushed her ashore on an even bottom. To leave her partially aground, liable to strains and to slide off as she did, was to court catastrophe. Unless the respondent was exempt of all duty of care, it too was chargeable with the result." (page 696)

In *F. E. GRAUWILLER TRANSP. CO. INC. v. EXNER SAND & GRAVEL CORPORATION ET AL.* (2 CCA) 162 F. (2d) 90, the Court said.

". * * * True, there is no set measure of this (tug's) liability, or of the occasions which will bring it in existence; as we said in Thorne, Neale & Co. v. Reading Co., supra, 'the question is of the reasonable implications from that undertaking' i.e. the towing contract. * * * " (p. 91)

* * * *

"* * * Whether she was unseaworthy because she leaked more than such a scow should, was a factor in determining what attention she required; but otherwise it was not important. It could become so only in the event that the dredging company had been misled by reliance upon her supposed seaworthy condition, and had exercised a care commensurate with that reliance. The evidence to the contrary was overwhelming. Christiansen found the scow aleak and reported it to Skogen who in turn reported it to the 'dredge operator' Ericksen, who sent out an employee to attend to it." (p. 91)

* * * *

"* * * *Being aware that the scow was unprotected its duty was by so much increased;* as we have said, it might refuse her altogether; but it might not load and then neglect her. Its position was analogous to that of a person who, being aware of the results of another's negligent failure to look out for himself, proceeds in disregard of it." (p. 92)

(parentheses and italics ours).

In *CURTIS BAY TOWING CO. OF VIRGINIA, INC. v. SOUTHERN LIGHTERAGE CORP.* (4 CCA) 200 F. (2d) 33, the Court said:

"The District Court held that the Clark failed in its duty to devote reasonable care to the pro-

tection of the Covered Wagon to prevent her foundering and that this want of care was the proximate cause of her loss. We are asked to review the correctness of this decision. (p. 34)

* * * *

"(3) When the precarious condition of the Covered Wagon was first noticed, she had suffered a diminution of some 85% of her freeboard and the danger of losing her was imminent. Upon boarding her, the tug's crew members could hear water streaming into her bilges, and her cargo of gravel was even then trickling overboard. Unless her trim could be promptly restored or greatly improved, good seamanship demanded that she be beached. * * * " (p. 35)

* * * *

"Nearby shoals and shores readily lent themselves to the success of such a venture. Notwithstanding, the tugmaster installed only one pump on the sinking scow and without standing by alongside for a sufficient time to ascertain its efficacy, resumed the towing in the face of rain, a flood tide and an adverse wind. Such an attempt could only serve to drive the scow deeper into the water, widen her seams, increase her floodage, and shorten her rapidly dwindling life. This is especially true in view of the fact that the scow's losing freeboard was on her leading edge." (p. 35)

Once it has been shown that the tug is placed on notice of a condition affecting the ability of its tow "to live," the burden is upon the tug to show that no reasonable effort to keep the barge afloat was omitted.

CURTIS BAY TOWING CO. OF VIRGINIA, INC. v. SOUTHERN LIGHTERAGE CORP. (4 CCA) 200 F. (2d) 33;
THE MACK ET AL. (E.D.N.Y.) 18 Fed. Supp. 69, 70;
DWYER LIGHTERAGE CO. v. CHRISTIE SCOW CORP. (E.D.N.Y.) 96 Fed. Supp. 903;
FOSS LAUNCH & TUG CO. v. THE KUKKUI, (N.D. Cal.) 130 Fed. Supp. 180, 184.

V.

Whatever may have previously been the law, it now appears to have been settled by the recent decisions of the U. S. Supreme Court in the so-called "Bisso" tow boat cases (BISSO, *RECEIVER v. INLAND WATERWAYS CORPORATION*, 349 U.S. 85, 93, 94) and *MISSISSIPPI VALLEY BARGE LINE COMPANY v. T. J. JAMES & CO. INC.* 5th Circuit, 244 F. 2nd 263, that a tow boat company may not validly contract against liability for its own negligence.

The fact that the bill of lading which does not incorporate, either expressly or by reference, the exculpatory provisions set forth in the tariff, constitutes the sole contract as between the parties, does not therefore appear to require further consideration.

The faults of R. T. C. appear to be clear. R. T. C. by the testimony of Hinkle, Stovall and Allemand, has furnished its own "yardstick" of negligence, viz., Hinkle lightly passed off Frieler's advices as to the leak in the No. 2 tank; Allemand, Captain of the DOTTIE D, with full knowledge of the dangerous trim of the PETER B at Port Arthur, Texas, nevertheless pushed the barge across the intervening 60 to 65 miles of open water, stern-first, at the grossly excessive rate of speed of more than 7 miles an hour; and Stovall, apparently in reliance of advices by Allemand, gave little but "lip-service" to Mrs. White's pleas for advices and assistance.

Allemand claims to have unscrewed the rake manhole cover bolts by hand and viewed the rakes, finding them dry; he made no attempt whatsoever to check the cargo tanks, particularly cargo Tank No. 2, which obviously must have been full of water if the forward rake was dry; he "figured it was none of his business" to check the cargo tanks. That it was his business (and that of R. T. C.) to do everything within his power to find the cause of the dangerous trim and to correct it, seems clear. *(HENRY DU BOIS SONS CO. v. PENNA. R. R. CO.* (2 CCA) 47 F. (2d) 172, 174)

That he did not in fact check the rake, either at Port Arthur or an hour and a half before the barge arrived at the Texas City terminal, seems to be confirmed not only by the fact that Frieler previously required a wrench to do the job, but also by the reports of the surveyors that when the barge was raised some 6 days after the sinking, the manhole covers could be released only after the bolt threads were stripped.

Allemand was required to file a report of all stoppages and delays during the time the barge was in his custody. That he did. Such report shows no stoppage of the tow while en route from Port Arthur to Texas City and no delay. Obviously, if he did inspect, it was not while the barge was in process of being pushed, stern-first at 7 miles an hour, across the open water of the Bay; and it seems equally apparent that he could not have done it in any case with the use of his hands alone.

It seems far more probable that Allemand was content to rely upon the fact that the barge was substantially in the same condition when he deposited her in the slip at Texas City as when he picked her up at Port Arthur. This is what he told Capt. Stovall in fact.

Knowledge by the tug captain, and hence by R. T. C. as to the conditions existing in the berth at the Texas City terminal are to be presumed. (*THE MARGARET*, 94 U.S. 494)

R. T. C. had towed the PETER B some twelve or thirteen round trips prior to the one in question and, as it was familiar with the normal freeboard of the barge, it knew that something must have been wrong when moored at Texas City. It, nevertheless, deposited her at midnight in a deep water berth, i.e., 30 feet of water, with her forward end exposed to the wind and wash of passing vessels in the channel, without notice. It could have, with little effort, placed the barge in a shallow area or, alternatively, could and should have siphoned the rake and the No. 2 tank free of water, which would have corrected the condition and prevented the sinking which subsequently occurred.

Capt. Stovall knew, or was bound to the knowledge given to Hinkle by Frieler, namely, that the barge had a leak in her No. 2 tank. Stovall also knew that Frieler was not at the plant and that Mrs. White was an inexperienced clerical employee who relied implicitly upon Stovall's statement that the barge was in safe condition, notwithstanding the fact that never before had the barge been in such condition, and notwithstanding the fact that her starboard corner was at the water line and waves were washing 2 or 3 feet up on the deck at that corner.

Mrs. White made it very plain in her testimony that, had Stovall indicated to her that the barge was in a dangerous condition, she would have and could have then communicated with Frieler and would have asked Stovall to assist.

Stovall denies that Mrs. White told him the starboard forward corner was at the water's edge and that waves were washing over it. He admits, however, that if she had so advised him, he would have done something about it.

For reasons best known to himself, Capt. Wynne, notwithstanding his claim to experience with floating equipment, adhered to the position that he wanted to be present when the barge was discharged and that the barge was all right, or Stovall would not have said so.

The reason for such light treatment is unknown and it can only be speculated upon, from the carelessness evidenced, that R. T. C. was satisfied with the protection afforded by the exculpatory clauses contained in its tariff.

The failure of R. T. C. to use even a modicum of care and caution in view of the knowledge imputed to it as to the condition of the PETER B was the proximate and actual cause of the sinking and loss claimed in the libel. *(CURTIS BAY TOWING CO. OF VA. v. SOUTHERN LIGHTERAGE CORP.* (4 CCA) 200 F. (2d) 33.

Proctors argue at great length that R. T. C. is certificated by the Interstate Commerce Commission and that the tugs were moving the PETER B subject to carriage rates in R. T. C. Freight Tariff. Ignoring well-established jurisprudence, proctors conclude, and would have this Court announce as a rule of law, that since R. T. C. is certificated as a common carrier and is regulated as a common carrier by the Interstate Commerce Commission, the rules of common carriage and not towage are applicable herein. The fact that R. T. C. was, at the time of the casualty which is the subject of the instant proceedings, and now is, certificated as a common carrier by water by the ICC, pursuant to the provisions of the Transportation Act of 1940, 49 U.S.C., Sec. 901, et seq., certainly cannot be denied. However, it is quite clear that the principles of ordinary towage and not common carriage govern the responsibility and liability of R. T. C. to barge and cargo interests.

The question of what rules of liability govern the responsibility of towboats operating as common carriers was first considered in the now famous Cornel litigation. In *CORNELL STEAMBOAT CO. CONTRACT CARRIER APPLICATION*, 250 I.C.C. 301 (1942), a case tried before the Interstate Commerce Commission, which was ultimately appealed to the United States Supreme Court, the issue was whether persons moving loaded and/or light barges

and scows owned or furnished by shippers and, accordingly, engaged in what was traditionally towing, as Cornell was, could properly be regulated as common carriers under the Transportation Act of 1940. Cornell maintained that in the absence of any specific provision of the Act bringing towers within the category of water carriers, it could not be assumed that Congress intended to change the established law that such towers were not carriers, or that Congress intended to include towers when it authorized the ICC to regulate water carriers. In support of its contention, Cornell cited a number of cases distinguishing between towage and carriage, but the ICC, in its decision holding that Cornell was subject to regulation as a common carrier under the Act, pointed out that the decisions cited by Cornell distinguishing between towage and carriage involved claims for damages, and stated significantly:

> "It will be seen that all the foregoing decisions involved claims for damages to the tow or its cargo, and all held in effect that the owners of towboats, when engaged only in towing vessels belonging to others and not under contracts of affreightment, were not carriers. Relating, as they do, to loss and damage, we do not accept them as determinative of the status of towers under part III of the act, which specifically provides in section 320 (d) that:
>
> > 'Nothing in this part shall be construed to affect any law of navigation, the admiralty jurisdiction of the courts of the United States, liabilities of vessels and their owners for loss or damage, or laws

respecting seamen, or any other maritime law, regulation, or custom not in conflict with the provisions of this part.'

"In view of section 320 (d), we consider that a finding that towers are carriers within the contemplation of part III would not affect their liability for loss or damage. Therefore the foregoing decisions may not be construed as a bar to the regulation of towers under part III.

* * * *

"We conclude that Part III discloses the intention of Congress to regulate towers engaged in interstate towing except to the extent that specific exemptions are provided."

In other words, although holding that Cornell was subject to regulation under the Act, the Commission pointed out that it was not the intent of Congress to disturb the rules governing the liability of vessels or their owners for loss or damage.

The decision of the Commission was a disappointment to Cornell and a suit was promptly filed complaining of its order. However, in *CORNELL STEAMBOAT CO. vs. UNITED STATES*, 53 F. Supp. 349 (D.C.N.Y. 1943), the District Court for the Southern District of New York, with three Judges participating, dismissed Cornell's complaint. The Court, like the Commission, emphasized that a common carrier so classified for the purpose of regulation was not

necessarily a common carrier for purposes of legal liability to customers:

> "We fail to understand plaintiff's contention that, because it was not a common carrier for purposes of liability under the Harter Act, 46 U.S.C.A. Sec. 190 et seq; or otherwise in Admiralty or at common law, this Act should be construed as not intended to include it as a common carrier; for in section 320 (d) Congress showed that it had in mind the difference between the question of liability and that of regulation. By labeling persons such as plaintiff 'common carriers' in this Act, they do not become such for all purposes; this is made clear by section 302 which, in so labeling them, expressly states that it does so 'for the purpose of this Act'. And see State of Washington ex rel. Stimson Lumber Co. vs. Kuykendall, 275 U.S. 207, 211, 212; United States vs. Brooklyn Eastern Dist. Terminal, 249 U.S. 296, 304; Liverpool & G. W. Steam Company vs. Phenix Insurance Co., 129 U.S. 397, 440."

The decision of the District Court was appealed by Cornell to the United States Supreme Court where, in the landmark case of *CORNELL STEAMBOAT CO. VS. UNITED STATES*, 321 U.S. 634, 88 L. Ed. 978, 64 S. Ct. 768 (1944), the Court affirmed the decision of the lower Court, explained that it was not the intent of Congress when it passed the Transportation Act of 1940 to disturb or determine the legal status of vessels for all purposes or to change the responsibility of vessels, but merely to provide for regulation of the rates of competing water carriers,

as part of a broad plan to regulate and standardize interstate transportation:

> " * * * But the authorities relied upon by Cornell are of little or no assistance here. The case at bar does not require that we determine at large the legal obligations of a tower or define the usual characteristics of a carrier. We are called upon only to interpret a single Act of Congress. With unquestioned power to regulate Cornell's business, Congress in this Act has given its own definition to Cornell's activities in words literally inclusive of those activities, and which operate to subject to the Act interstate activities in the business of towing, which at common law was a common calling. Sproul v. Hemmingway, 14 Pick. (Mass) 1, 6, 25 Am Dec 350. The Act in which Congress has included this definition is designed, not to determine the legal status of vessels for all purposes, but to provide for regulation of the rates and services of competing interstate water carriers as part of a broad plan or regulation for all types of competing interstate transportation facilities * * * "

Actually, in the Cornell litigation, the Interstate Commerce Commission and the Courts merely took cognizance of the unambiguous language of Section 320 (d) of the Act itself, which specifically provides that nothing in the Act shall be construed to affect "liabilities of vessels and their owners for loss or damage."

As important, if not more important than the Cornell case, is the case of *PETITION OF RELIANCE MARINE TRANSP. & CONST. CORP.*, 89 F. Supp. 272 (D.C. Conn. 1950). The case is particularly pertinent because in some significant respects the facts were similar to the facts of the instant case. The owner of the Tug SKIPPER had filed a tariff with the Interstate Commerce Commission, and was apparently, like R. T. C., certificated as a common carrier by water. Nevertheless, the Court, citing the decision of the Supreme Court in the Cornell case, unequivocally held that the existence of the published tariff did not transform for liability purposes what was really private carriage into public carriage:

> "* * * This tariff was designated I.C.C. No. 7 and McWilliams was licensed and required to file such a tariff by the Interstate Commerce Commission. I hold, however, that the existence of this published tariff did not serve to transform a private carriage into a public carriage: it was the Congressional intent by the Transportation Act of 1940, 54 Stat. 898, 49 U.S.C. Sec. 1 et seq; 901 et seq; not to change the liabilities of vessels, but merely to subject them to regulation. Cornell Steamboat Co. vs. U.S., 321 U.S. 634, 64 S. Ct. 768, 88 L. Ed. 978."

If the owners of the Tug SKIPPER by publishing a tariff could not "transform" what was really private carriage into common carriage, certainly, by publishing a tariff, R. T. C. could not "transform" what was really towage into common carriage.

It is manifestly clear that the movement of the PETER B was one of towage in the traditional sense. Cargo interests loaded and furnished the barge and R. T. C., by arrangement, merely the vessel to move the barge. Such a movement has been for years by custom and by definition towage. Under the holdings of the Cornell case and Petition of Reliance Marine Transp. & Const. Corp., supra, even the timely issuance of a bill of lading could not "transform" what was towage into common carriage. Of course, the Ideal Cement Company vs. The Tickfaw, 143 F. Supp. 904 (E.D. La. 1956) is also particularly pertinent in this regard because in that case the Court held that the movement was towage although a bill of lading had been accepted.

Gross inequities would result if this movement were held to be one of common carriage for liability purposes. This is true because, to hold that the rules of liability of common carriage apply, would have the effect of rendering the relatively recent decision of the Supreme Court in the case of Bisso vs. Inland Waterways, supra, declaring release towage agreements void, as contrary to public policy, virtually meaningless in most instances where the owner of the negligent towing vessel was certificated by the Interstate Commerce Commission as a common carrier. The Bisso decision would be rendered virtually meaningless, because the Harter Act automatically applies in the case of domestic common carriage and the operators of vessels acting as common carriers could not be made answerable for damages resulting from the faulty management or navigation of their vessels as responsibility for such errors is specifically excluded by Section 3 of the Act, if due diligence has been exercised to make the carrying vessel sea-

worthy. Obviously, most casualties in which towboats are involved are occasioned by errors in management or navigation, and, if it were held that the rules of common carriage and not towage apply, where towboats, operated by certificated companies, are moving barges owned or furnished by the cargo interests, the incredible result would be that vessels operating as common carriers would be in an infinitely better position from a liability standpoint than vessels operating under the rules of towage, although traditionally common carriers have with good reason been held to a higher degree of care than ordinary towers. Of course, the respondent realizes that in view of the Bisso decision responsibility for negligence can now be avoided only through the Harter Act and, accordingly, the towboat operator "is adjusting its cap to fit the charge in circumstances" and is maintaining that the rules of common carriage apply. It is indeed ironic to find River operators who have long attempted to avoid liability as common carriers by insisting that they were towers, now attempting to hold themselves out as common carriers for liability purposes.

If this Court should erroneously hold that the rules of common carriage govern liabilities herein, an additional incongruous and inequitable situation would be needlessly created. By the terms of the Transportation Act of 1940, vessels under 100 tons cannot act as common carriers by water without the special permission of the ICC, 49 U.S.C. 903 (g) (2). Accordingly, if it were held that the towboats of more than 100 tons operated by certificated companies act as common carriers, even insofar as liability is concerned, the large towing concerns who can best afford to compensate individuals for damages occasioned by the negligent navigation of their vessels, would in some in-

stances receive a protection not afforded the operators of smaller vessels who could operate, only as towers, and who, although no longer able to protect themselves with release towage agreements, could not as towers avail themselves of the protection of the Harter Act. Is one vessel, towing a barge furnished by cargo owners, a towing vessel for liability purposes and another a carrier merely because it is larger and the company operating it has been certificated by the Interstate Commerce Commission? It is submitted that the Cornell litigation correctly decided this question negatively.

Throughout this litigation Respondent has maintained that the release agreement and all of the other exculpatory clauses and terms of its Tariff must be presumed to be reasonable and enforceable unless and until the Interstate Commerce Commission declares any one or more of them invalid and unenforceable. Counsel for Petitioner submits that neither any such tariff nor the approval thereof by the Interstate Commerce Commission can be used or enforced in such a way as to vitiate the doctrine laid down by this Court in Bisso v. Inland Waterways Corporation, supra.

Respondent has cited United States v. Western Pacific Railroad Company, 352 U.S. 59, 77 S. Ct. 161 (1956), as authority for its contention that the Interstate Commerce Commission and not the Courts must pass on the reasonableness of such clauses of its Tariff. We must point out that the contention of the Respondent that the Courts are powerless to declare illegal exculpatory clauses in Interstate Commerce Commission approved tariffs, and the litigant must first resort to the Interstate Commerce Commission,

is answered by the words of this Court itself in the decision relied upon by Respondent, for, in United States v. Western Pacific Railroad Company, supra, this Court was very careful to limit the effect of its decision by saying, at page 69:

> "By no means do we imply that matters of tariff construction are never cognizable."

Further, in connection with the construction of another tariff this Court clearly held in the case of St. Louis, Iron Mountain & Southern Railway Co. v. Hasty & Sons, 255 U.S. 252, 41 S. Ct. 269 (1921), at page 256:

> "This matter is so free from doubt that there is no occasion to apply to the commission for a construction, as insisted by appellant * * * "

In Great Northern Railway Company v. Merchants Elevator Company, 259 U.S. 285, 42 S. Ct. 477 (1922), this Court likewise stated in a case concerning the construction of a Tariff that (page 294):

> "Here no fact, evidential or ultimate, is in controversy; and there is no occasion for the exercise of administrative discretion. The task to be performed as to determine the meaning of words of the tariff which were used in their ordinary sense, and to apply that meaning to the undisputed facts. That operation was solely one of construction; and preliminary resort to the Commission was, therefore unnecessary."

We hardly need call the Court's attention to the fact that in United States v. Western Pacific Railroad Company, supra, the question involved concerned tariff classifications and rates, while in this case there is no question of tariff classifications or rates but solely a legal question as to the validity and construction of exculpatory clauses which the Courts are preeminently the fit tribunals to pass upon rather than the Interstate Commerce Commission. This is especially true since the Interstate Commerce Act (Transportation Act of 1940), supra, under the terms of which Respondent is certificated, specifically provides that it was not the intent of Congress to change the legal liabilities of vessels for damages.

CONCLUSION

The Court of Appeal for the Fifth Circuit, in the case of Mississippi Valley Barge Line Company v. T. L. James & Co., Inc., et al, 5 Cir., 244 F. 2d 263 held the same provision as involved in the instant case void and of no effect. Writs were applied for and denied in the United States Supreme Court on November 12, 1957, 78 S. Ct. 121.

As the Court is well aware, the question of the validity of the exculpatory clause releasing a tower from its own negligence was litigated in the various courts all over the United States and in some circuits was held valid and in others as void and against public policy. This Court in the Bisso case, supra, granted writs in order that this question be finally set at rest. This Court held that such an exculpatory clause was void and of no effect. Towers as well as

shippers were apparently relieved because prior to this they were constantly in a quandry as to their rights.

However, now the Court of Appeal has disregarded the Bisso case and has reversed the decision of the trial court, holding the clause void and of no effect, and has remanded the case in order that petitioner have opportunity to seek administrative relief before the Interstate Commerce Commission to test the validity of this exculpatory clause, otherwise to give full effect to the exculpatory clause.

The question of the validity of this clause has already been passed on by this Court and the Court of Appeal is apparently trying to divest the Courts from having jurisdiction to pass on this all important question. The question of the validity of this clause has been squarely before this Court and passed upon. To allow the Interstate Commerce Commission to have jurisdiction to pass on this would merely throw this matter back into the turmoil that existed prior to the Bisso case.

To leave this matter as it now stands can only lead to confusion which we feel sure this Court intended to put at an end with the granting of writs and the subsequent decision in the Bisso Case. If this matter is not set at rest, undoubtedly shipping interests will again be faced with conflicting decisions from the various circuits as there was prior to the Bisso case.

It is respectfully submitted that the decision of the Court of Appeals should be reversed and the decree of the District Court should be reinstated.

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Petitioner

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CERTIFICATE

I certify that copies of the foregoing brief have been served upon opposing counsel of record by placing the same properly addressed in the United States mail with adequate postage affixed thereto.

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Supreme Court of the United States

OCTOBER TERM, 1958.

No. 155

SOUTHWESTERN SUGAR AND MOLASSES CO., INC.,

Petitioner,

versus

RIVER TERMINALS CORPORATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF ON BEHALF OF RIVER TERMINALS CORPORATION, RESPONDENT.

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HAUSER PRINTING CO., INC., NEW ORLEANS

INDEX

PAGE

THE OPINIONS BELOW 1

THE STATUTES INVOLVED 2

THE QUESTIONS PRESENTED FOR REVIEW 2

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 8

ARGUMENT 9

I. THE DECREE OF THE COURT OF APPEALS IS CORRECT 9

This was Regulated Transportation 9

To Engage in Regulated Transportation A Certificated Carrier Must Establish, Observe and Enforce Reasonable Rates, Regulations and Practices and Must Embody Them in a Tariff Filed with the Interstate Commerce Commission from Which the Carrier Cannot Depart 11

R.T.C. Filed Its Tariff in Accordance with The Requirements of Part III of the Interstate Commerce Act, and It Became Effective. Thereafter It Bound Both Shippers and R.T.C. "With the Force of Law" 13

The Court of Appeals Recognized the Principle That Until Changed Tariffs Bind Both Carriers and Shippers with the Force of Law, Held Correctly That the Interstate Commerce Commission Has the Primary Jurisdiction to Consider Tariff Changes and Remanded the Case To the District Court To Give Southwestern an Opportunity to Attack the Reasonableness of the Tariff Before the Interstate Commerce Commission 15

INDEX—(Continued)

PAGE

It Is Not Against Public Policy for a Carrier By Water To Exculpate Itself from Liability for Loss and Damage Which Results from the Negligent Management of a Vessel 20

The Bisso Case Does Not in Any Way Affect the Principles Pronounced by the Court of Appeals in Its Opinion and for Which We Are Here Contending 22

The Cornell Steamboat Case Does Not in Any Way Affect the Principles Pronounced by the Court of Appeals in Its Opinion and for Which We Are Here Contending 24

Exculpation from Liability Is One of the Matters with Which the Interstate Commerce Commission May Deal in Approving Rates, Charges and Services of Carriers 25

II. IN THE EVENT THE DECREE OF THE COURT OF APPEALS BE NOT AFFIRMED, THEN THIS CASE SHOULD BE REMANDED TO THE COURT OF APPEALS FOR FURTHER PROCEEDINGS 26

III. IF YOUR HONORS CONSIDER ANY ISSUE WHICH HAS NOT BEEN DETERMINED BY THE COURT OF APPEALS, THEN IT IS OUR POSITION THAT THE DECREE OF THE DISTRICT COURT IS CLEARLY ERRONEOUS 27

First Assignment of Error:

The [District] Court Erred in Holding that the Libellant, Southwestern Sugar and Molasses Company (Inc.), Had Any Interest in the Barge PETER B Which Entitled It to Maintain a Libel for Damage to the Barge 28

INDEX—(Continued)

PAGE

Second Assignment of Error:

The Court Erred in Holding that in the Movement of the Barge PETER B with a Cargo of Molasses Therein from Reserve, Louisiana, to Texas City, Texas, the Respondent, River Terminals Corporation, was Guilty of Negligent Towage 32

There Was No Negligent Towage 34

The Cause of the Sinking of the Barge PETER B Was Inherent Unseaworthiness Which Existed When the Barge Was Converted from an Open Hopper Barge to a Tank Barge, Grossly Aggravated by Deterioration Due to Old Age and Improper Maintenance Which Manifested Itself by a Leaky Condition During Loading at Reserve. All of This Was Unknown to R.T.C. 38

The Loading at Reserve 40

The PETER B Sprang a Leak Due to Deterioration and Improper Maintenance 41

Cause of the Sinking of the Barge PETER B 45
Southwestern Had the Last Clear Chance to

Prevent the Barge PETER B from Sinking 51

CONCLUSION 71

APPENDIX 73

CITATIONS

Cases PAGE

Bisso v. Inland Waterways Corporation, 349 U.S. 85, 75 S. Ct. 629 22

Brown v. Fletcher, 237 U.S. 583, 35 S. Ct. 750 27

The Cornelius Vanderbilt, 120 F. 2d 766, 1941 A.M.C. 1245 52

Cornell Steamboat Company v. United States, 321 U.S. 634, 64 S. Ct. 768 ..... 10, 22, 24

Coyle Lines v. U. S., 195 F. 2d 737, 1952 A.M.C. 715 51

Crancer v. Lowden, 315 U.S. 631, 62 S. Ct. 763 15

Crawford v. Indian Towing Company, 240 F. 2d 308, 1957 A.M.C. 250 ..... 52, 71

El Dorado Oil Works v. United States, 328 U.S. 12, 66 S. Ct. 843 ..... 18, 19

Far East Conference v. United States, 342 U.S. 570, 72 S. Ct. 492 17

General American Tank Car Corp. v. El Dorado T. Co., 308 U.S. 422, 60 S. Ct. 325 ..... 18, 19

In Re O'Donnell, 26 F. 2d 334 10

The Lehigh, 12 F. Supp. 75 10

Lone Star Bag & Bagging Co. v. Florida Sword, 1956 A.M.C. 1560 51

Lowden v. Simonds-Shields-Lonsdale Grain Co., 306 U.S. 516, 59 S. Ct. 612 15

Lutcher & Moore Lumber Co. v. Knight, 217 U.S. 257, 30 S. Ct. 505 27

Lykes Bros. S. S. Co. v. Waterman, 138 F. Supp. 725, 1956 A.M.C. 1194 51

The New York, 175 U.S. 187, 20 S. Ct. 67 51

Sacramento Navigation Company v. Salz, 273 U.S. 326, 47 S. Ct. 368 ..... 9, 10

The Sanday, 122 F. 2d 325, 1941 A.M.C. 1249 52

CITATIONS—(Continued)

Cases—(Continued) PAGE

Stall & McDermott v. The Southern Cross, 95 F. Supp. 612, 1951 A.M.C. 549 ..... 32, 45, 51

Texas & Pacific R. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 27 S. Ct. 350 17

United States v. Ballard, 322 U.S. 78, 64 S. Ct. 882 27

United States v. Western Pacific Railroad Co., 352 U.S. 59, 77 S. Ct. 161 16

The Vale Royal, 51 F. Supp. 412 10

Statutes

Sections 1 and 2 of the Carriage of Goods by Sea Act, being 46 U.S.C. 1304, Act of April 16, 1936, c. 229, § 4, 49 Stat. 1210 ..... 20, 21, 22, 90

The Elkins Act, 49 U.S.C. 41, et seq. 12

Revised Statute 4282, being 46 U.S.C. 182, Act of March 3, 1851, c. 43, § 1, 9 Stat. 635 (The Fire Statute) 20, 88

Sections 1, 2 and 3 of the Harter Act, being respectively 46 U.S.C. 190, 46 U.S.C. 191, and 46 U.S.C. 192, Act of February 13, 1893, c. 105, §§ 1, 2 and 3, 27 Stat. 445 ..... 21, 88, 89

Part III of the Interstate Commerce Act, 54 Stat. 929, et seq., as amended, Title 49, Chapter 12, United States Code, and particularly: 2, 16, 26

Sections 303(b), 303(d) and 303(e) of Part III of the Interstate Commerce Act, being 49 U.S.C. 903, Act of February 4, 1887, c. 104, Part III, § 303, as added September 18, 1940, c. 722, Title II, § 201, 54 Stat. 931, and amended 1946 Reorg. Plan No. 3, §§ 101-104, eff. July 16, 1946, 11 F.R. 7876, 60 Stat. 1097, June 12, 1948, c. 457, 62 Stat. 386 ..... 10, 82

CITATIONS—(Continued)

Statutes—(Continued) PAGE

Sections 305(a) and 305(c) of Part III of the Interstate Commerce Act, being 49 U.S.C. 905(b), Act of February 4, 1887, c. 104, Part III, § 305, as added September 18, 1940, c. 722, Title II, § 201, 54 Stat. 934 ..... 11, 84

Sections 306(a), 306(c) and 306(d) of Part III of the Interstate Commerce Act, being 49 U.S.C. 906, Act of February 4, 1887, c. 104, Part III, § 306, as added September 18, 1940, c. 722, Title II, § 201, 54 Stat. 935 ..... 2, 11, 12, 85

Section 314 of Part III of the Interstate Commerce Act, being 49 U.S.C. 914, Act of February 4, 1887, c. 104, Part III, Section 314, as added September 18, 1940, c. 722, Title II, Section 201, 54 Stat. 945 ..... 18, 87

Section 320(d) of Part III of the Interstate Commerce Act, being 49 U.S.C. 920(d), Act of February 4, 1887, c. 104, Part III, § 320, as added September 18, 1940, c. 722, Title II, § 201, 54 Stat. 950 ..... 25, 88

Textbooks

Benedict on Admiralty, Sixth Edition, Section 245, page 82 31

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 155

SOUTHWESTERN SUGAR AND MOLASSES CO., INC.,

Petitioner,

versus

RIVER TERMINALS CORPORATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF ON BEHALF OF RIVER TERMINALS CORPORATION, RESPONDENT.

THE OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported in 253 F. 2d 922 and will be found at R. 269.[1] The findings of fact and conclusions of law of the United States District Court for the Eastern District of Louisiana are reported in 153 F. Supp. 923 and will be found at R. 261.

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[1] For the Court's convenience it is reproduced in the Appendix, *infra* page 73 *ff.*

THE STATUTES INVOLVED

Part III of the Interstate Commerce Act, 54 Stat. 929, *et seq.*, as amended, Title 49, Chapter 12, United States Code, and particularly Sections 306(a), 306(c) and 306(d) of Part III of the Interstate Commerce Act, being 54 Stat. 935, 49 U.S.C. 906 (a), (b) and (d), which provide in general that every common carrier by water shall file its tariff with the Interstate Commerce Commission, shall state therein its rates and "any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such rates, fares, or charges, or the value of the service rendered to the passenger, shipper or consignee" and shall neither depart therefrom nor perform any transportation not specified in the tariffs filed.[2]

THE QUESTIONS PRESENTED FOR REVIEW

1. Whether a Court or the Interstate Commerce Commission has the primary jurisdiction to determine the reasonableness and validity of rates, and of all rules and regulations which in anywise change, affect or determine any part or the aggregate of the rates or charges or the value of the service rendered to a shipper or consignee, prescribed in a tariff duly filed by a carrier with the Interstate Commerce Commission and by it published.

2. In the event that this Court should determine that such primary jurisdiction does not lie exclusively in the Interstate Commerce Commission but may be exercised by the Courts, then the question will be presented whether in a case such as the one at bar, where the

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[2] Reproduced in full in the Appendix, *infra*, p. 85 *ff*. Particular reference is also made to Sections 305(a) and 305(c), 54 Stat 934, being 49 U.S.C. 905, (a) and (c) reproduced in full in the Appendix, *infra*, p. 84 *ff*. Reference is also made to the Elkins Act, as amended, being 49 U.S.C., Section 41, *et seq.*, prescribing penalties for violation of the Interstate Commerce Act.

United States Court of Appeals has decided only the jurisdictional question and reserved its decision on the merits, Your Honors will consider and decide this case on its merits or remand it to the Court of Appeals for such decision.

3. If this Court considers any issue in this case other than the jurisdictional issue decided by the United States Court of Appeals for the Fifth Circuit, the question then will arise whether the District Court has correctly decided this case on its merits, it being our position, duly presented to the Court of Appeals, that the District Court's decision is clearly erroneous.

STATEMENT OF THE CASE

Respondent, River Terminals Corporation,[3] was a common carrier by water of freight for hire between various points,[4] so certificated by the Interstate Commerce Commission under Part III of the Interstate Commerce Act.[5] This transportation was performed in barges either owned by respondent or furnished by shippers, with the use of towboats owned or procured by the carrier.

Petitioner, Southwestern Sugar and Molasses Co., Inc.,[6] was a shipper of freight which, pursuant to a regular practice for R.T.C. to transport molasses for Southwestern in Southwestern's barges, in the first part of September, 1944, gave respondent an order to transport a cargo of molasses from Reserve, Louisiana, to Texas City, Texas in the Barge PETER B, furnished by South-

[3] Hereinafter referred to as "R.T.C."

[4] Including Reserve, Louisiana, located on the Mississippi River, and Texas City, Texas, located on the Intracoastal Waterway system, the points between which moved the shipment which gave rise to this litigation.

[5] R.T.C's. Request for Admissions No. 9, R. 40, and Southwestern's Admission No. 9, R. 60, both offered in evidence jointly by Southwestern and R.T.C., R. 160-161.

[6] Hereinafter referred to as "Southwestern".

western. This R.T.C. proceeded to do under its then current Tariff I.C.C. No. A-9. The barge was loaded by Southwestern at Reserve, Louisiana, no representative of R.T.C. being then present, and, unknown to R.T.C. before its tug took the barge away from Reserve, sprang a leak in a cargo tank during loading.

In due course of business, without any knowledge of the condition of the barge, on September 17, 1944, R.T.C. issued a bill of lading [7] in its standard form for the cargo of molasses and delivered it to Southwestern, which retained the possession thereof without comment.

R.T.C. moved the barge with its molasses cargo on the Mississippi River to Harvey, Louisiana, where the barge entered the Intracoastal Canal and was incorporated into a westbound flotilla with three other barges carrying pipe and steel.[8] The four barges were moved successively by two of R.T.C.'s tugs, three barges were delivered en route, and the Barge PETER B, in the early hours of the morning of September 23, 1944, completed its voyage to Texas City and was tied up at a pier designated by Southwestern for its delivery. The tug then went on to Houston. The presence of the barge was known to the pier watchman on delivery, and was ascertained by those in charge of Southwestern's Texas City terminal early—and certainly not later than 9:00 a.m.—on the morning of September 23.[9] With full knowledge that the barge had sprung a leak while being loaded at Reserve, they did not undertake to discharge the barge,

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[7] Attached to the supplemental libel as Exhibit A, R. 26; introduced in evidence, R. 160.

[8] Respondent's Exhibit #4, sent to this Court in the original, identified and offered in evidence R. 164. Page 5 of the report attached to that exhibit shows the tow of the Tug SAMBO on September 18, 1944, consisted of the Barge PETER B loaded with molasses, Barges ABL 155 and ABL 164 loaded with pipe, and Barge CT 350 loaded with steel.

[9] R. 174.

notwithstanding the fact that they had facilities available so to do and a tankerman-employee available to perform this service.[10] The barge was permitted to sit unattended all of that day and the following night, tied to the wharf, and in the early morning hours of September 24 the forward end of the barge sank, but the after end always remained afloat. The barge and part of the cargo were salvaged, and Southwestern sued R.T.C. for the cost of raising the barge, for alleged damage thereto and for cargo allegedly lost.

This litigation was initiated by a libel filed on September 22, 1945, in the United States District Court for the Eastern District of Louisiana, by Southwestern against R.T.C., wherein Southwestern alleged a verbal contract of towage and negligent towage as the bases for recovery. R.T.C. answered, denying liability, generally speaking on four grounds:[11]

1. That it was guilty of no negligence in the movement of the barge and its cargo.

2. That the barge sank from inherent unseaworthiness.

3. That R.T.C. was relieved of any liability by virtue of certain terms and provisions of its Tariff I.C.C. No. A-9,[12] including two provisions in particular:

> (a) when shipments are transported in barges furnished by the shipper then barges and cargoes will be handled at owner's risk only,

[10] R. 171 and R. 134.

[11] Original answer, R. 7, *ff.*

[12] Items 580 and 640 of R.T.C.'s Tariff I.C.C. No. A-9 are reproduced in full in the Appendix, *infra*, p. 92 *ff.* They have been admitted by Southwestern; see R.T.C.'s Request for Admissions, No. 9, R. 41-42, and Southwestern's Admission No. 9, R. 60, offered in evidence jointly by Southwestern and R.T.C., R. 160-161.

whether loss or damage is caused by negligence or otherwise (Item 580); and

(b) where a shipper furnishes a barge for the carriage of cargo, the presentation of the cargo in the barge for movement on the rates named in the tariff shall constitute a guarantee to the carrier that such barge is seaworthy and that the barge and cargo are in suitable condition for the prospective voyage (Item 640).

4. That R.T.C. delivered the barge at destination in apparent good order and condition, tied it up safely and departed, and that such delivery constituted a fulfillment of R.T.C.'s obligations.

Subsequently, by an amended libel filed on April 5, 1948,[13] Southwestern alleged the issuance of a bill of lading which it attached to the amended libel, marked Exhibit A,[14] and alleging as to the molasses cargo an affreightment instead of a towage, sought cargo damage on the theory that it had delivered at origin to the carrier, R.T.C., sound cargo which R.T.C. had delivered damaged at destination. In answer to this amended libel R.T.C. reiterated its denial of any negligent act committed in the movement of the barge and its cargo, reiterated the allegations of its original answer with regard to its tariff, and plead an additional item, Item 896(g), of its tariff[15] providing that actual placement of a barge is delivery thereof by the carrier to the point of unloading designated by the shipper. It added as a further ground for defense that any damage to the barge and its cargo was caused proximately by Southwestern's

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[13] R. 26.

[14] R. 26. Introduced in evidence R. 160.

[15] Item 896(g) of R.T.C.'s Tariff I.C.C. No. A-9, reproduced in full in the Appendix *infra*, p. 93. It has been admitted by Southwestern; see R.T.C.'s Request for Admissions No. 9, R. 41-42, and Southwestern's Admission No. 9, R. 60, offered in evidence jointly by Southwestern and R.T.C., R. 160-161.

failure to care for the barge and its cargo after its delivery at Southwestern's wharf at Texas City.

The District Court held[16] that the movement of both barge and cargo constituted towage; that R.T.C. had been guilty of negligence in the management of the Barge PETER B[17] which constituted negligent towage; and rendered an interlocutory decree of liability in favor of Southwestern (leaving quantum of damages to be determined subsequently). R.T.C. appealed from this interlocutory decree to the United States Court of Appeals for the Fifth Circuit, assigning a number of errors,[18] including the failure of the District Court to give effect to the exculpatory provisions in respondent's tariff and want of interest in the libellant to sue for ~~cargo~~ barge damage, and attacking the District Court's finding of negligent towage on the ground that it was clearly erroneous. The Court of Appeals,[19] without passing on any other issue, but specially reserving them, held that R.T.C. had raised a good defense based on the exculpatory provisions of its tariff filed with the Interstate Commerce Commission because these exculpatory provisions should be considered valid and be given effect unless and until they be determined invalid by the Commission; and remanded this case to the District Court with instructions to give effect to the exculpatory provisions of R.T.C.'s tariff unless and until they are declared invalid in a proceeding to be initiated by Southwestern before the Commission within a reasonable time.

Southwestern petitioned for a writ of certiorari to review this judgment, which Your Honors have granted.

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[16] See Findings of Fact and Conclusions of Law, R. 261.

[17] As distinguished from negligence in care and custody of cargo.

[18] Reproduced at R. 258.

[19] Opinion reproduced in the Appendix *infra* p. 73 *ff.*

SUMMARY OF ARGUMENT

I. The judgment of the Court of Appeals is correct. This is transportation regulated under Part III of the Interstate Commerce Act. The provisions of the carrier's tariff constitute the law between the parties and should be given full force and effect unless and until changed in accordance with law. The Interstate Commerce Commission is vested with primary jurisdiction to determine the propriety of the tariff, the necessity for any changes and, if necessary, to prescribe them. The action of the Court of Appeals in remanding this case to the District Court to permit petitioner to apply to the Interstate Commerce Commission for relief is proper.

II. In the event that this Court reverses the judgment of the Court of Appeals it should remand this case to that Court for further proceedings.

III. In the event that this Court reverses the judgment of the Court of Appeals and does not remand this case to the Court of Appeals for further proceedings but considers this case on its merits, then we submit that the decree of the District Court is clearly erroneous because (a) the petitioner has no interest which entitles it to sue for barge damage in this case; (b) there was no negligent towage; (c) the Barge PETER B sank from inherent unseaworthiness; and (d) the petitioner had the last clear chance to prevent the sinking of the Barge PETER B; any act performed by the respondent merely resulted in a condition, but could not have been the proximate cause of the sinking.

ARGUMENT

I.

THE DECREE OF THE COURT OF APPEALS IS CORRECT

The opinion of the Court of Appeals[20] set forth so clearly, precisely and succinctly the facts necessary to its determination of the one issue which it considered and the law applicable thereto that any amplification thereof by us seems superfluous. However, we submit the following:

This Was Regulated Transportation

Unquestionably the movement of both the Barge PETER B and its molasses cargo from Reserve to Texas City was transportation regulated under Part III of the Interstate Commerce Act, whether the movement of the barge and cargo were both towage or both affreightment or the movement of the barge was towage and of the cargo, for which the bill of lading had been issued, affreightment. This is the view of the case which has been taken by the Court of Appeals: this was regulated transportation regardless of whether it was towage or affreightment.[21] No one would seriously contend that if the movement were affreightment it was not subject to

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[20] Reproduced in the Appendix, *infra* p. 73. *ff.*

[21] We consider that it is immaterial whether this movement was affreightment or towage for the purpose of determining the precise question which has been determined by the Court of Appeals, i.e., that R.T.C.'s tariff provisions are valid and should be given effect unless and until declared invalid by the Interstate Commerce Commission in a proper proceeding. However there are other aspects of this case, determined by the District Court but not by the Court of Appeals, in which the distinction might become material. In *Sacramento Navigation Company v. Salz*, 273 U.S. 326, 47 S. Ct. 368, Your Honors held that the movement of cargo on board a barge towed by a tug or towboat is affreightment and not towage, notwithstanding the fact that the vessel performs towage service to the barge. Although in that case the cargo-carrying barge and the towing vessel were commonly owned, it does not appear that Your Honors gave any effect in your decision to such

(Continued)

regulation under Part III of the Interstate Commerce Act, and any doubt that towage of a regulated commodity is equally subject to such regulation has been put at rest by Your Honors in *Cornell Steamboat Company v. United States*, 321 U.S. 634, 64 S. Ct. 768. There are only three possible pertinent exemptions found in Part III of the Interstate Commerce Act, and none of them are applicable to this movement. The first exemption is that commonly known as the "Bulk Commodities Exemption" contained in Section 303(b) of Part III of the Interstate Commerce Act.[22] For the purpose of this exemption multiple vessels in one flotilla are considered the same as a single vessel, and since the Barge PETER B was moved in one of R.T.C.'s regular tows in a flotilla including three bargeloads of pipe which were regulated commodities, the entire movement became regulated.

The second exemption is found in Section 303(d) of Part III of the Interstate Commerce Act.[23] This exemption is inapplicable because while the Barge PETER B was a tank barge, it had never been certificated by the Coast Guard, which is a condition precedent to the application of the exemption.

The third exemption is found in Section 303(e) of Part III of the Interstate Commerce Act,[24] which per-

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[21] (Continued)
joint ownership. On the contrary you placed your decision squarely on the contractual relationship which arose out of the bill of lading for the movement of the cargo (273 U.S., at pages 328, 329; 47 S. Ct. at page 369). This is the interpretation which has been placed on *Sacramento Navigation Co.—Salz* by all the Courts other than the Fifth Circuit that have considered the question of the pertinency of the common ownership of the tug and barge. See *In Re O'Donnell* (2 C.C.A., 1928) 26 F. 2d 334; *The Lehigh* (D.C.W.D.N.Y., 1935) 12 F. Supp. 75; and *The Vale Royal* (D.C.D.Md., 1943) 51 F. Supp. 412.

[22] 54 Stat. 941 and 60 Stat. 1097, being 49 U.S.C. 903(b), reproduced in the Appendix *infra*, p. 82.

[23] 54 Stat. 941 and 60 Stat. 1097, being 49 U.S.C. 903(d), reproduced in the Appendix *infra*, p. 82.

[24] 54 Stat. 941 and 60 Stat. 1097, being 49 U.S.C. 903(e), reproduced in the Appendix *infra*, p. 82.

mits the Commission by order either upon application of shippers or on its own initiative from time to time to exempt the transportation of certain commodities. No exemption has ever been granted with regard to molasses cargoes, and as the petitioner is making no such claim, it is unnecessary to labor this point.

We reiterate that the movement of the Barge PETER B and its cargo was transportation regulated under Part III of the Interstate Commerce Act.

To Engage In Regulated Transportation A Certificated Carrier Must Establish, Observe And Enforce Reasonable Rates, Regulations And Practices And Must Embody Them In A Tariff Filed With The Interstate Commerce Commission From Which The Carrier Cannot Depart.

Section 305 of Part III by Paragraph (a)[25] requires every common carrier by water with respect to transportation regulated by the Act to furnish such transportation upon reasonable request therefor and to establish, observe and enforce just and reasonable rates, fares, charges and classifications and reasonable regulations and practices with regard to all phases of the transportation.

Section 305(c) of Part III[26] forbids discrimination by any carrier subject to the Act.

Section 306(a) of Part III[27] requires a regulated carrier by water to file with the Commission, and print, and keep open to public inspection tariffs showing all rates, fares, charges, classifications, rules, regulations

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[25] 54 Stat. 934, being 49 U.S.C. 905(a), reproduced in full in the Appendix *infra*, p. 84.

[26] 54 Stat. 934, being 49 U.S.C. 905(c), reproduced in full in the Appendix *infra*, p. 84.

[27] 54 Stat. 935, being 49 U.S.C. 906(a), reproduced in full in the Appendix, *infra*, p. 85.

and practices for the transportation of property in interstate commerce, and that such tariffs shall embody "any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such rates, fares, or charges, or the value of the service rendered to the passenger, shipper, or consignee".

Section 306(c) of Part III[28] forbids a regulated carrier by water from charging, demanding, collecting or receiving any greater or less or different compensation than the published rate and from extending to any person any privilege or facilities for transportation affecting the value thereof except such as are specified in its tariff.

Section 306(d) of Part III[29] forbids any change to be made in any rate, fare, charge, classification, rule, regulation or practice specified in any effective tariff by a regulated water carrier except after thirty days' notice of the proposed change filed with the Commission and posted.

The Elkins Act[30] penalizes as a misdemeanor the willful failure of any carrier to file and publish the tariffs and rates as required by the Act and to strictly observe such tariffs until changed according to law.

Such are the requirements and prohibitions with which R.T.C. was faced, first, when it filed its tariff with the Interstate Commerce Commission, and second, when it undertook the movement of the Barge PETER B and its cargo from Reserve, Louisiana, to Texas City, Texas.

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[28] 54 Stat. 935, being 49 U.S.C. 906(c), reproduced in full in the Appendix, *infra*, p. 86.

[29] 54 Stat. 935, being 49 U.S.C. 906(d), reproduced in full in the Appendix, *infra*, p. 86.

[30] 49 U.S.C. 41, *et seq.*

R.T.C. Filed Its Tariff In Accordance With The Requirements Of Part III Of The Interstate Commerce Act, And It Became Effective. Thereafter It Bound Both Shippers And R.T.C. "With The Force Of Law".

Subject to the requirements hereinabove specified, R.T.C. filed with the Interstate Commerce Commission its Tariff I.C.C. No. A-9, which was then published, printed and kept open to public inspection. In that tariff R.T.C. named a rate for the transportation of molasses laden by the shipper in its own barge from Reserve, Louisiana, to Texas City, Texas. Necessarily, in determining that rate R.T.C. both had to take into consideration the practices and regulations which would in anywise change, affect, or determine any part or the aggregate of such a rate or charge or the value of the service rendered to the shipper, and to embody such practices and regulations in the tariff.

It is obvious that in constructing any rate the regulated carrier by water must include its out-of-pocket costs to be incurred in performing the service, its overhead, and its profit; otherwise, the rate would be unreasonably low and would result in a discrimination against other methods of transportation. One out-of-pocket item of cost—and a large one—is the cost of insuring the shipment against the risks of loss or damage. Where the risk of such loss or damage is to be borne by the carrier, necessarily the rate has to be increased by the charge for the insurance premium, and this is an amount which is omitted from the rate where the shipper assumes the risk of loss and damage.

In this instance R.T.C. constructed a rate which placed upon the shipper the risk of loss and damage and

accordingly a rate which was lower than would have been necessary had the carrier insured. In addition, the carrier found itself faced with a special problem in all instances where the shipper furnished its own barge already loaded: first, the inability properly to inspect the barge, and secondly, the inability to repair any damage other than a patent minor flaw. A standard 11-foot barge loaded by a shipper and delivered to a carrier is loaded to an average depth of 9½ feet, which means that 9½ feet of the hull of the barge are under water and not subject to inspection. Cargo compartments are filled with cargo, and the rake and other spaces not occupied by cargo are usually not gas-free so they cannot be entered for inspection. Accordingly, a carrier by water who takes a shipper's barge loaded by the shipper with cargo must take it in an "as is" condition and must rely upon the responsibility of the shipper to furnish a barge seaworthy both as to condition and as to stowage of cargo.

Accordingly, in publishing its Tariff I.C.C. No. A-9, R.T.C. embodied therein, for moving molasses from Reserve, Louisiana, to Texas City, Texas, when loaded by the shipper in shipper's barge, a rate conditioned on the shipper supplying and loading the barge, assuming the risk of loss and damage, and guaranteeing the seaworthiness of the barge and proper stowage of the cargo therein, and, as required, stated those practices as regulations in the tariff; first, that the barges and cargoes would be handled at owner's risk only, and second, that the presentation of the barge by the shipper to the carrier for movement would constitute a guarantee that the barge was seaworthy and the barge and cargo were in suitable condition for the prospective voyage.[31]

[31] These two provisions are reproduced *infra*, Appendix, p. 92; and see footnote No. 12 *supra* p. 5.

Under the provisions of the Act, upon the presentation of this tariff to the Commission it might have permitted the filed tariff to become effective, or it might have suspended it temporarily and either on its own motion or on the motion of an aggrieved party inquired into the reasonableness of the rates, charges and practices, and might have required the carrier to render either an additional service to the one proposed, or an entirely different service, with the rate and attendant practices prescribed by the Commission. The Commission permitted the tariff to become effective, and it thereafter remained effective without protest during the entire period when R.T.C. performed for Southwestern the service which is the basis of this litigation. The well-settled rule has frequently been pronounced by this Court that "Until changed, tariffs bind both carriers and shippers with the force of law." *Lowden v. Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516, 520, 59 S. Ct. 612, 614; *Crancer v. Lowden*, 315 U.S. 631, 635, 62 S. Ct. 763, 765.

The Court Of Appeals Recognized The Principle That Until Changed Tariffs Bind Both Carriers And Shippers With The Force Of Law, Held Correctly That The Interstate Commerce Commission Has The Primary Jurisdiction To Consider Tariff Changes And Remanded The Case To The District Court To Give Southwestern An Opportunity To Attack The Reasonableness Of The Tariff Before The Interstate Commerce Commission.

The Court of Appeals unequivocally recognized the principle that "Until changed, tariffs bind both carriers and shippers with the force of law". Holding that the Interstate Commerce Commission is vested with primary

jurisdiction to effect changes in tariffs where those changes require specialized competence and administrative discretion and involve issues of transportation policy, the Court of Appeals remanded this case to the District Court with instructions to give effect to R.T.C.'s tariff provisions unless Southwestern, within a reasonable time, files its application with the Interstate Commerce Commission to effect a change in the tariff.

We submit that the Court of Appeals could not have done otherwise. First, it is obvious, as stated by that Court in its opinion, that for "reasons made amply clear in Part III of the Interstate Commerce Act, 49 U.S.C.A. 901, *et seq.*, Congress has confided to the Interstate Commerce Commission the devising and controlling of a regulatory scheme over the use of water carriers in foreign and domestic commerce". The second, and even more cogent reason is found in Your Honors' jurisprudence that when tariffs involve issues of transportation policy they ought not to be ignored, set aside, or otherwise set for naught except after consideration by the Interstate Commerce Commission in the interest of a uniform and expert administration of the regulatory scheme laid down by the Interstate Commerce Act. Your Honors' latest pronunciation on the subject will be found in *United States v. Western Pacific Railroad Co.*, 352 U.S. 59, 77 S. Ct. 161. That was a suit by the United States against a carrier to recover an alleged overpayment of freight said to have arisen from the improper classification of the shipment, so that the question involved was whether the correctness of that classification was for determination by the Courts or by the Interstate Commerce Commission. Remarking that,

> "No fixed formula exists for applying the doctrine of primary jurisdiction. In every case

> the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation,"

Your Honors, reviewing the jurisprudence, held that in that case there was required an intimate knowledge of the reasons why different classifications had been set by the Interstate Commerce Commission, and therefore the determination of the correctness of the classification should be referred to the Commission, saying,

> "A tariff is not an abstraction. It embodies an analysis of the costs incurred in the transportation of a certain article and a decision as to how much should, therefore, be charged for the carriage of that article in order to produce a fair and reasonable return. Complex and technical cost-allocation and accounting problems must be solved in setting the tariff initially."

In reviewing the jurisprudence on this question Your Honors referred first to the old case of *Texas & Pacific R. Co. v. Abilene Cotton Oil Co.* (1907) 204 U.S. 426, 27 S. Ct. 350, in which emphasis was laid on the desirable uniformity which would obtain if initially a specialized agency passed on certain types of administrative questions, and pointed out that more recently the expert and specialized knowledge of the agencies involved has been particularly stressed, citing *Far East Conference v. United States*, 342 U.S. 570, 72 S. Ct. 492, and remarking that the two factors are part of the same principle,

> " 'now firmly established, that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though

> the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure.' Id. 342 U.S. at pages 574-575, 72 S. Ct. at page 494."

Another case illustrative of the primary jurisdiction which is accorded the Interstate Commerce Commission in tariff matters is *General American Tank Car Corp. v. El Dorado T. Co.*, 308 U.S. 422, 60 S. Ct. 325, and its subsequent appearance *sub nom. El Dorado Oil Works v. United States*, 328 U.S. 12, 66 S. Ct. 843. This litigation is particularly pertinent here because it involves the use of freight cars not owned by railroads but furnished by shippers, which is a situation comparable to the furnishing of a barge by a shipper. It should be here noted that Section 314 of Part III[32] authorizes a shipper to furnish an instrumentality to be used in the transportation service. Section 314 of Part III is comparable to Section 15(13) of Part I of the Interstate Commerce Act relative to rail carriers, which was under consideration in *General American Tank Car Corp.—El Dorado T. Co.* Your Honors there held that freight cars are "facilities" of transportation, so by analogy it seems clear that a barge is an "instrumentality" used in transportation which can be furnished by a shipper.

In *General American Tank Car Corp.—El Dorado*

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[32] 54 Stat. 945, being 49 U.S.C. 914, reproduced in the Appendix, *infra*, p. 87.

T. Co. the shipper sued the owner of tank cars leased to the shipper to recover the difference, which owner had retained, between rentals due under the lease and a mileage allowance made for the use of the cars. Your Honors held that this involved an administrative problem for the Interstate Commerce Commission of determining the lawfulness and reasonableness of the allowance made and that the Court should hold the suit in abeyance pending the conclusion of appropriate administrative proceedings. This was done, and proceedings were taken before the Interstate Commerce Commission which determined the issues involved. This determination was attacked subsequently in *El Dorado Oil Works—United States*, wherein the El Dorado Oil Works had filed a complaint in the District Court challenging the action taken by the Interstate Commerce Commission allegedly pursuant to instructions contained in Your Honors' opinion in *General American Tank Car Corp.—El Dorado T. Co.* The Court reaffirmed the Interstate Commerce Commission's jurisdiction of the matters involved.

It is obvious here that it will require an administrative proceeding before the Interstate Commerce Commission to determine the reasonableness of the rate which R.T.C. had fixed for the carriage of molasses based on the shipper's furnishing and loading the barge, assuming the risk of loss and damage, and warranting the seaworthiness of the barge and the propriety of the stowage of the cargo therein. In such an administrative proceeding there will have to be ascertained the out-of-pocket costs of performing the transportation service, including the cost of insuring the risk of loss and damage, the carrier's overhead and the reasonableness of the profit which resulted from the published rate. In no other way can the carrier's tariff be determined to have been unreasonable and set aside, and unless and until it be set aside it

constitutes the law between the parties. Accordingly, we submit that the Fifth Circuit properly disposed of this case by remanding it to the District Court with instructions there to give effect to R.T.C.'s tariff unless and until it be changed in a proper administrative proceeding initiated before the Interstate Commerce Commission by Southwestern.

It Is Not Against Public Policy For A Carrier By Water To Exculpate Itself From Liability For Loss And Damage Which Results From The Negligent Management Of A Vessel.

The Court of Appeals remarked in its opinion that there is no general public policy forbidding the exculpation of water carriers from their negligence. This is a considerably broader assertion than is required for the determination of this case. What we are here contending is that there is no general public policy forbidding the exculpation of water carriers from liability for loss or damage occurring as a result of negligent acts of their employees in the management of vessels, as distinguished from care and custody of cargo.[33]

The public policy is found in the acts of the Congress of the United States. Illustrative of its statement that there is no general public policy forbidding the exculpation of water carriers from their negligence, the Court

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[33] In this connection, however, it must not be overlooked that by Revised Statute 4282, which is 46 U.S.C. 182, commonly known as the "Fire Statute", reproduced in the Appendix *infra* page 88, Congress exonerated a water carrier from liability for loss or damage to cargo occasioned by fire "happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner", thereby exonerating a ship-owner from liability for fire occasioned without the owner's actual fault or privity. This exculpation is reiterated in the Carriage of Goods by Sea Act, being 46 U.S.C. 1304(2)(b), hereinafter referred to, which expressly exculpates a carrier from responsibility for loss or damage occurring from "fire, unless caused by the actual fault or privity of the carrier".

of Appeals cited Section 3 of the Harter Act.[34] This act, enacted by the Congress of the United States in 1893, exculpates a vessel owner, provided he has used due diligence to furnish a seaworthy vessel, from liability for loss and damage to cargo "resulting from faults or errors in navigation or in the management of the vessel".

Parenthetically, neither Section 1 nor Section 2 of the Harter Act[35] are material to consideration of this case. Section 1 has no reference to the management of a vessel, but only to care and custody of cargo, which are not involved in this litigation. Section 2 deals with the obligations of the owner of a vessel transporting merchandise or property to exercise due diligence to equip, man, provision and outfit the vessel properly and to make it seaworthy and capable of performing its intended voyage and the obligations of the master, officers, agents, or servants with regard to stowage of cargo. R.T.C. was not the owner of the Barge PETER B and did not stow the cargo therein, but on the contrary relied on the guarantee of the owner that the barge was seaworthy and that the cargo was properly stowed therein.

The public policy, as evidenced by Section 3 of the Harter Act in 1893 was even further liberalized in 1936 by Congress by the Carriage of Goods by Sea Act.[36] This liberalization of policy is evidenced by the elimination of the requirement that as a condition to exculpation the carrier must have used due diligence to make his vessel seaworthy. While the Act requires a carrier to furnish a seaworthy vessel, it does not destroy any exculpative right where the unseaworthiness does not contribute to

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[34] 27 Stat. 445, being 46 U.S.C. 192, reproduced in the Appendix, *infra*, p. 89.

[35] 27 Stat. 445, being respectively 46 U.S.C. 190 and 46 U.S.C. 191, reproduced in the Appendix *infra* p. 88 *ff*.

[36] 49 Stat. 1208, being 46 U.S.C. 1300, *et seq*.

the loss or damage for which exculpation is sought.[37]

The second sub-section of Section 4 of the Carriage of Goods by Sea Act[38] provides that neither the carrier nor the ship shall be responsible for loss or damage arising from an act of neglect or default of the master, mariners or pilot, or the servants of the carrier in the navigation or the management of the ship.[39]

We submit that these Acts of Congress evidence that there is no general public policy which forbids the exculpation of water carriers from liability for loss or damage resulting from negligence of their employees in the management of a vessel.

The Bisso Case Does Not In Any Way Affect The Principles Pronounced By The Court Of Appeals In Its Opinion And For Which We Are Here Contending.

The petitioner, contending that the exculpatory clauses embodied in R.T.C.'s tariff are invalid *per se*, cites two cases in support of that argument, the first being *Bisso v. Inland Waterways Corporation*, 349 U.S. 85, 75 S. Ct. 629.[40]

Whether or not the *Bisso* Case, which has been severely criticized in many quarters, is correct and will be adhered to by this Court if and when the questions therein involved are again presented to it, we do not

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[37] Section 1 of the Carriage of Goods by Sea Act, 49 Stat. 1210, being 46 U.S.C. 1304, reproduced in the Appendix, *infra*, p. 90.

[38] 49 Stat. 1210, being 46 U.S.C. 1304(2), reproduced in the Appendix, *infra*, p. 90.

[39] Qualified, of course, by Section 1, which would deny such exculpation if the loss or damage resulted from unseaworthiness.

[40] The second being *Cornell Steamboat Company v. United States*, 321 U.S. 634, 64 S. Ct. 768, hereinafter discussed.

here discuss.[41] Suffice it to say that we contend that there is nothing in the *Bisso* Case contrary to the principles which we are here contending for.

The differentiation between this case and the *Bisso* Case contained in the opinion of the Fifth Circuit is so complete and apposite that we hesitate to enlarge on it. However, we do point out:

The rationale of the *Bisso* Case does not exist here. The *Bisso* Case was a case of private towage in which the rate and the practices of the tower depended entirely upon the result of bargaining between the tow and the tower. This factor seems to have impressed greatly the organ of the majority of the Court, for he points out[42] that "increased maritime traffic of today makes it not less but more important that vessels in American ports be able to obtain towage free of monopolistic compulsions". There follows an example drawn from the English jurisprudence of what he deems to have been the unfortunate result of an exculpatory clause in a towage contract, permitted by the English law.

Of course, no such rationale exists here. The fact

[41] It is noteworthy that in the *Bisso* Case, decided by a divided Court of 5 to 3 (Mr. Justice Harlan took no part in the consideration and determination of the case), one of the majority, Mr. Justice Douglas, concurring, prefaces his concurrence with the remark, "I do not think we know enough about the economics and organization of this business to change the established rule of The Steamer Syracuse, 12 Wall. 167, 171, 20 L. Ed. 382, and The Wash Gray, 277 U.S. 66, 73, 48 S. Ct. 459, 460, 72 L. Ed. 787, that a tug may not contract against her own negligence". Perhaps upon another presentation of this question to the Supreme Court a record will have been made which will show conclusively that, as remarked by Mr. Justice Frankfurter in his dissenting opinion (349 U.S. 118, 119, 75 S. Ct. 647), unless Your Honors are prepared to forbid the tug to insure against losses or liabilities resulting from its negligence "then the question ultimately is whether public policy requires that the tug, rather than the tow, shall bear the cost of insurance. Indeed, in all likelihood, the economic burden will fall upon the tow in either case". Such showing might very well influence Mr. Justice Douglas to join in formulating a different rule than that pronounced in the *Bisso* Case.

[42] 349 U.S. 91-92, 75 S. Ct. 633.

that the Interstate Commerce Commission has been charged with the duty of requiring carriers to afford affreightment and towage upon bases and at rates deemed reasonable by the Commission forbids any monopolistic practice.

As a matter of fact, the concurring and the dissenting opinions in the *Bisso* Case both constitute invitations to an investigation of the regulated towboat business to ascertain by whom—that is, by the owner of the tow or the towboat—the risk of loss and damage to the tow[redacted] and any cargo thereon should be assumed as the basis for the rate to be charged for the towage, and the amount of the rate based on such assumption. Certainly, the Interstate Commerce Commission is well-suited to conduct such an investigation extensively, exhaustively and impartially. Such an investigation has been made possible by the disposition which the Fifth Circuit has made of this case, and we respectfully submit that Your Honors should not disturb that disposition.

The Cornell Steamboat Case Does Not In Any Way Affect The Principles Pronounced By The Court Of Appeals In Its Opinion And For Which We Are Here Contending.

The second case cited by petitioner in support of its contention that the exculpatory clauses embodied in R.T.C.'s tariff are invalid *per se* is *Cornell Steamboat Company v. United States*, 321 U.S. 634, 64 S. Ct. 768. We submit that there is absolutely nothing in that decision or in the proceedings before the Interstate Commerce Commission and the United States District Court which culminated in the Supreme Court's decision, which is in any way contrary to the principles for which we are here contending. All that was decided in that liti-

gation was that a tower which held itself out to tow for the public under certain circumstances would be held to be a common carrier subject to the regulation of Part III of the Interstate Commerce Act. That was the sole issue that was before Your Honors in that case. True, in your opinion in that case Your Honors referred to Section 320(d) of Part III of the Interstate Commerce Act,[43] which provides that nothing in Part III shall be construed to affect the liability of vessels and their owners for loss or damage, but, as remarked by the Fifth Circuit in its opinion, with regard to the authority of the Interstate Commerce Commission to permit the parties by their contracts of carriage approved by the Commission to fix their respective rights and liabilities:

> "Nor do we think that anything in Section 920(d) of Part III of the Interstate Commerce Act requires any different holding. It provides only that none of the provisions of the statute shall of themselves be held to work any change in liabilities, etc. This is not to say that the Act does not authorize the Commission to permit the parties, by their contracts of carriage, when approved by the Commission, to make such changes in their respective liabilities." [44]

Exculpation From Liability Is One Of The Matters With Which The Interstate Commerce Commission May Deal In Approving Rates, Charges And Services Of Carriers.

Lastly, but certainly not least, we submit that exculpation of a water carrier from liability for loss and damage resulting from the management of a vessel as a factor in fixing the level of its rate is one of the

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[43] 54 Stat. 950, being 49 U.S.C. 920(d), reproduced in the Appendix *infra*, p. 88.

[44] Appendix, *infra* p. 81.

matters which Part III of the Interstate Commerce Act has placed within the purview of the Interstate Commerce Commission as incident to approving rates, charges and services of the carriers whose activities it has the duty to regulate. There is no limitation in Part III of the Interstate Commerce Act on the authority of the Interstate Commerce Commission in devising and controlling a regulatory scheme over the use of water carriers in foreign and domestic commerce, and in the absence of such a specific limitation in the Act of Congress we submit that the Courts should not legislate one.

We therefore submit that the decision of the United States Court of Appeals for the Fifth Circuit correctly disposes of this case and that Your Honors should affirm that decision.

II.

IN THE EVENT THE DECREE OF THE COURT OF APPEALS BE NOT AFFIRMED, THEN THIS CASE SHOULD BE REMANDED TO THE COURT OF APPEALS FOR FURTHER PROCEEDINGS

In the event that Your Honors determine adversely to the respondent the one question decided by the Court of Appeals, i.e., that the exculpatory provisions of R.T.C.'s tariff should be enforced unless and until they are declared invalid by the Interstate Commerce Commission, then we submit that Your Honors should remand this case to the Court of Appeals for its determination of the other issues which respondent presented to that Court on its appeal. None of these issues has been passed on or considered by the Court of Appeals, but on the contrary they have been specially reserved, as appears from the Court of Appeals' opinion. Whether or not

after determination by the Court of Appeals any of these issues will survive for presentation to Your Honors is problematical, but in any event you will then have the benefit of the views of the Court of Appeals. Accordingly, we submit that unless the decree of the Court of Appeals be affirmed, this case should be remanded to that Court. *Brown v. Fletcher*, 237 U.S. 583, 35 S. Ct. 750; *Lutcher & Moore Lumber Co. v. Knight*, 217 U.S. 257, 267, 268, 30 S. Ct. 505, 509, 510; *United States v. Ballard*, 322 U.S. 78, 88, 64 S. Ct. 882, 887.

III.

IF YOUR HONORS CONSIDER ANY ISSUE WHICH HAS NOT BEEN DETERMINED BY THE COURT OF APPEALS, THEN IT IS OUR POSITION THAT THE DECREE OF THE DISTRICT COURT IS CLEARLY ERRONEOUS

In the event that Your Honors reverse the Court of Appeals and do not remand this case to that Court for further consideration of the issues which were before it on respondent's appeal which were not determined by that Court, then we assume that Your Honors necessarily will consider this case on its merits. In that event, it is our contention that the decree of the District Court is clearly erroneous. Our assignments of error to the decree of the District Court will be found in the Record at page 258. Of these assignments we discuss here assignments No. 1 and 2.[45]

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[45] Assignments No. 3 and 4 are covered in Point I of our Argument: "The Decree of The Court Of Appeals Is Correct."

First Assignment Of Error

The [District] Court Erred In Holding That The Libellant, Southwestern Sugar And Molasses Company (Inc.), Had Any Interest In The Barge PETER B Which Entitled It To Maintain A Libel For Damage To The Barge

The evidence in the District Court demonstrates that the Barge PETER B when built was known as ABL-109.

By a bill of sale [46] dated September 1, 1942, Petroleum Carrier Corporation sold Barge ABL-109 to Southwestern for the sum of $10,000.00. By a bill of sale dated [47] March 29, 1944, Southwestern sold Barge ABL-109 to International Transportation Corporation, a New York corporation, for the sum of $7,500.00. By bill of sale [48] dated February 11, 1946, International Transportation Corporation sold Barge ABL-109 to Southwestern, a Texas corporation, for the sum of $7,500.00.

The movement of Barge ABL-109, or PETER B, and its sinking, on which this litigation is predicated, took place in September, 1944. Southwestern had parted with title to the barge on March 29, 1944, and did not reacquire title until February 11, 1946, so that when it sank, International Transportation Corporation was the owner of the barge. Furthermore, Mr. Frieler, Southwestern's Texas City Terminal Manager, called as a witness by libellant, so testified.[49] He also testified that Southwestern operated the PETER B under a charter

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[46] Exhibit RTC-2 sent up to this Court in the original. Attached to R.T.C's Request for Admissions, R. 39, and offered in evidence jointly by Southwestern and R.T.C., R. 160-161.

[47] Exhibit RTC-3 sent up to this Court in the original. Attached to R.T.C's Request for Admissions, R. 39, and offered in evidence jointly by Southwestern and R.T.C., R. 160-161.

[48] Exhibit RTC-4 sent up to this Court in the original. Attached to R.T.C's Request for Admissions, R. 39, and offered in evidence jointly by Southwestern and R.T.C., R. 160-161.

[49] R. 65.

party from International Transportation Corporation. We quote at length his testimony on direct examination with regard to the ownership and operation of Barge PETER B and Southwestern's obligation to pay for raising and repairing this barge:[50]

"Q. Did Southwestern own the PETER B?

A. Yes, sir.

Q. And did Southwestern operate the PETER B?

A. Southwestern operated the PETER B and the International Transportation Corporation owned the barge.

Q. Oh, you say Southwestern operated her and International Transportation Corporation owned her?

A. Yes, sir.

Q. Do you know on what basis Southwestern operated the PETER B?

* * * * *

[Objections and colloquy between counsel omitted.]

BY MR. VARIAN:

Q. Do you understand the question? On what basis did Southwestern operate the vessel?

A. Southwestern paid all the keep-up [sic] of the repairs, painting and other expenses and the International Transportation Company received so much money. How much I don't know.

* * * * *

[Testimony with regard to the relation of Southwestern to International omitted.]

Q. Now did I understand you to say that Southwestern paid International some sum of mon-

[50] R. 65 *ff.*

cargo in them, and he never looked in the cargo tanks. Furthermore, we submit that if both the No. 1 and No. 2 forward cargo tanks had filled up with water this would not have been as heavy as the molasses that they were designed to carry, and that in itself could not have caused the barge to sink. The record is replete with such testimony and in fact the only competent testimony in this case is to that effect.

Frieler himself knew that water running into No. 2 cargo tank from a hole in the side plating would not affect the barge, because in a letter that he wrote to Mr. Kaplan,[101] Frieler said:

> "The Barge is on its way to Texas City. She left New Orleans at five in the morning on Monday. On Sunday I went back to Reserve and asked the watchman if the Barge was on even keel when she left on Sunday morning at 6. He confirmed that the Barge was level. During the night enough water must have run into the tank to be even with the water-line; therefore the Barge will not turn over. I will not unload her until the surveyors has [sic] made an inspection."

Captain Lambdin, Southwestern's own surveyor, had this to say in his report of survey:[102]

> "CONCLUSION:
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> "The fact that the barge made the passage from Reserve, La., to Texas City, Texas, safely disproves any theory that the barge was unseaworthy at the beginning of the voyage. When the barge was converted to a bulk carrier the hull arrangements were such as to provide all of the reserve buoyancy at the after end of the barge,

[101] Exhibit R.T.C. 11, a photostat of which has been sent to this Court in the original; offered in evidence jointly by Southwestern and R.T.C., R. 160-161.

[102] Exhibit Lambdin 2, R. 214, 214; re-offered R. 159.

this reserve buoyancy being provided by a pump room, size (26'4" x 24' x 13' x 15' = 11') or 26'.333 x 18'.5 x 11' = 5358 cubic feet.

"The leak in No. 2 tank was not sufficient to have caused the sinking of the barge, as the barge would have remained afloat had No. 2 tank completely filled. It is obvious that as the No. 2 tank filled the draft forward increased until the bow draft exceeded the stern draft and the molasses cargo being heavier than water endeavored to run forward. The action set up abnormal longitudinal stresses on the bulkheads and pipe lines within the barge causing them to leak, allowing the cargo to find its way forward until all buoyancy at the forward end of the barge was overcome and the barge sank bow down in 30' of water.

"In the opinion of this undersigned surveyor the sinking of the barge was not the result of the leaking into No. 2 tank, but was due to contributory causes unforeseen and not anticipated by the charterers' representatives after the barge arrived at Texas City, Texas, September 23, 1944."

In his deposition Captain Lambdin testified[103] that when he surveyed the barge he found no evidence of a collision, of the barge having struck anything, and that the holes in the side plating in the way of No. 2 starboard tank were caused "definitely from deterioration", and then asked what in his opinion caused the barge to sink, he replied:[104]

"In my opinion, the barge sank as the result of water coming into No. 1 tank of the barge and leaking from there into the rake of the barge slowly, which caused the barge to go down by the head; and then as the barge went down by the head, the cargo in the barge had a tendency to

[103] R. 208-209.
[104] R. 209.

run forward through the ullage in the tanks and increased the weight at the forward end; and with the bulkheads in the barge leaking, the cargo eventually kept creeping forward, and that, along with the small amount of water coming in through these pinholes forward, killed all the buoyancy in the forward end of the barge and the barge set up on its head and went down."

Asked [105] if he had included that opinion in his survey report, he replied in the affirmative; and asked if he had expressed that opinion to the Southwestern Sugar and Molasses Company, he also replied in the affirmative and further testified that he had expressed that opinion at a meeting which had been attended by Johnny Dee as RTC's representative and "Mr. Kaplan, the owner of the Southwestern Sugar and Molasses Company, Mr. Julius Gissel, of Collins and Gissel, who was the agent for the Southwestern Sugar and Molasses Company, and myself." That when he had told Mr. Kaplan [106] "I thought the tugboat had nothing to do with the sinking of the barge", Mr. Kaplan had replied: "Then I guess that lets the towboat company out", and, thereupon, Mr. Dee said: [107] "There is no use of me staying here any longer", and Mr. Dee left

Captain Wynne, who was Southwestern's cargo surveyor, in his report of survey [108] had this to say:

"At 8 A.M. on October 3rd. I carefully examined the condition of the Barge, in so far as possible with the barge afloat, and found that the holding down lugs on the manhole on the forward dry rake were corroded so badly that it would

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[105] R. 209.
[106] R. 210.
[107] R. 210.
[108] Wynne Exhibit 1 sent to this Court in the original, footnote 88 *supra*, p. 42.

have been impossible to have made this manhole watertight as the nuts could not be worked on the bolts and the cover screwed down tight.

"It was also found that the gaskets in all of the manholes leading into all of the compartments were in a very badly deteriorated condition; none of the manholes being in such condition that they could be fastened down and made water-tight.

"The valve stems leading up through the deck were not packed which allowed water to enter the compartments from these sources quite freely.

"The barge was placed on the drydock at the Port Houston Iron Works, Houston, Texas, on October 11, 1944, after which I examined the bottom of the barge and other under-water parts and found that the third plate forward on the starboard side second strake from the deck, was very badly wasted; numerous holes wasted in the plate, the diameter of these holes ranging from ½" to 2". There was no evidence of the barge having been in a collision.

"In view of all of the above it is the opinion of the undersigned Surveyor that the cause of this barge sinking and the subsequent loss to the cargo was due to unseaworthiness of the barge at the time of sailing from Reserve, La., on September 16, 1944. This unseaworthiness being due to the above mentioned plate being badly wasted, allowing water to gradually enter the forward cargo compartments of the Barge to such an extent that during the night of September 23rd. or the early morning hours of September 24th. while the barge was lying at Texas City water came over the deck of the barge, entering the dry rake compartment forward, and in turn subsequently entering through the deck openings along the barge until the barge had shipped sufficient water to cause the forward end to sink."

Before closing our discussion on this point, we reiterate what we have heretofore said to the Court, that Captain Wynne and Captain Lambdin, though they represented Southwestern and not RTC, were all called by RTC as its witnesses. There were two other surveyors who represented the Barge PETER B interests, neither of whom have been called as witnesses by Southwestern. They are Captain Colbury, who represented International Transportation Company, the owner of the PETER B, and whose survey report was introduced in evidence and sent to this Court in the original, which is referred to *supra*, and Captain A. D. Whittaker, the surveyor for the hull underwriters.[109]

We have presented here a situation where both Southwestern's cargo surveyor, Captain Wynne, and their hull surveyor, Captain Lambdin, ascribe the sinking of the Barge PETER B to causes over which RTC had absolutely no control. Captain Wynne ascribes it to inherent unseaworthiness of the barge, and while Captain Lambdin says the barge was "seaworthy" when it left Reserve, the condition which he described constitutes at law inherent unseaworthiness, though Captain Lambdin, not being a lawyer, did not realize it. The theories on which RTC's liability has been predicated were developed in the offices of Southwestern's eminent proctors, and we respectfully submit that those theories are wholly specious and are not supported at all by any evidence in the case.

The failure of the PETER B interests to call Whittaker and Colbury as witnesses raises the inference that

[109] See Wynne Exhibit 1, footnote 88 *supra*, p. 42, sent to this Court in the original, p. 5, reciting that "on September 26, 1944, at 2 P.M., Mr. Whittaker, surveyor for the United States Salvage Association, representing the hull underwriters, arrived on board * * * ", and the Lambdin survey report, Exhibit Lambdin 2, footnote 102 *supra*, p. 46, sent to this Court in the original, reciting that Whittaker and Colbury were present at the survey of the barge after it had been hauled out.

if they had been called their testimony would have been unfavorable to International and/or Southwestern. Such is the well settled jurisprudence. *The New York*, 175 U.S. 187, 20 S. Ct. 67; *Coyle Lines v. U. S.* (C.A. 5, 1952), 195 F. 2d 737, 1952 A.M.C. 715.[11] We submit that it must be assumed that Southwestern's proctors have no testimony which supports their theories.

We urge emphatically that all of the evidence in the case is indisputably to the effect that the Barge PETER B sank from unseaworthiness and that on the authority of *Stall & McDermott v. Southern Cross, supra*, this places the responsibility for the sinking on the barge owner and exonerates the tower. Accordingly, we submit that RTC's libel should be dismissed on that ground; however, alternatively, and in the alternative only and in the event that Your Honors should reach the conclusion that RTC was guilty of any negligence, then we submit that in any event Southwestern's libel should be dismissed because it had the last clear chance to prevent the Barge PETER B from sinking.

Southwestern Had The Last Clear Chance To Prevent The Barge PETER B From Sinking

While we emphatically deny that RTC was guilty of negligent towage and insist that RTC had discharged its entire obligation to the Barge PETER B and its cargo when it tied up the barge in apparent good order and condition and with its cargo intact, and that the sinking of the barge was due to causes for which RTC cannot be blamed, alternatively we urge that in any event Southwestern had the last clear chance to prevent the

[11] Followed by the District Courts in the Fifth Circuit in *Lykes Bros. S. S. Co. v. Waterman* (D.C. E.D. La. 1956), 138 F. Supp. 725, 1956 A.M.C. 1194; *Lone Star Bag & Bagging Co. v. Florida Sword* (D.C.S.D. Tex., 1956), 1956 A.M.C. 1560, pages 1563 and 1566 (two cases).

sinking of the PETER B and the loss and damages consequent thereon, and Southwestern's failure to exercise this last clear chance relieves RTC from any liability which might otherwise have existed. In this regard this litigation is squarely within the doctrine laid down by the Fifth Circuit in *Crawford v. Indian Towing Company* (C.A. 5, 1957) 240 F. 2d 308, 1957 A.M.C. 250. Here the Fifth Circuit held in no uncertain terms that notwithstanding the prior conduct of one of the parties in an occurrence which gives rise to litigation, if the other party subsequently has an opportunity so to conduct itself as to make ineffectual that prior conduct but fails to do so, that failure renders the inactive party solely liable for the occurrence and the resulting damage, citing *The Cornelius Vanderbilt* (2 Cir.) 120 F. 2d 766, 1941 A.M.C. 1245, and *The Sanday*, (2 Cir.) 122 F. 2d 325, 1941 A.M.C. 1249, and saying:[111]

> "Whether this be called an application of the doctrine of last clear chance or the rule of causation, makes little difference. Where as here, an act is negligent, but is not the proximate cause of the injury, it is merely a condition. As such it is not a basis of liability. *P. Dougherty Co. v. United States* (3 Cir.), 207 F. 2d 626."

We submit that whatever may have been the prior conduct of RTC, Southwestern had the last clear chance to prevent the sinking of the PETER B, so that any prior conduct of RTC was merely a condition and not the proximate cause of such sinking and "as such it is not a basis of liability."[112]

Let us examine Southwestern's conduct after the Barge PETER B was tied up.

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[111] 240 F. 2d 311, 1957 A.M.C. 255.

[112] *Crawford v. Indian Towing Company, P. Dougherty Co. v. United States*, both *supra*.

The Tug DOTTIE D tied up the Barge PETER B at Texas City on Saturday, September 23, at 12:01 A.M., at the place indicated by the watchman.[113] In the District Court Southwestern made a point of the authority of the watchman to designate the place where the PETER B was to be tied up, but because we deem that immaterial we don't discuss it and base our argument solely on the knowledge of the position and condition of the barge gained thereafter by the employee in charge of Southwestern's Texas City Office, Miss Wertenberger (Mrs. White).

The first responsible Southwestern employee to learn of the presence of Barge PETER B was Garcia, whose deposition was taken by Southwestern at Texas City in the latter part of 1946.[114] Garcia was then no longer employed by Southwestern, but was on his own as a building contractor.[115] He described his duties while employed by Southwestern as warehouseman and loading and unloading tank cars and the barges, including the Barge PETER B[116] and performing maintenance work on Southwestern's various vessels, including the PETER B.

Garcia testified that when he came to work the morning that the barge arrived (Saturday), he saw the barge and "noticed that the barge was pretty low, close to the water surface" with water going over the right-hand corner of the bow of the barge and going some two or three feet on deck.[117] Asked on direct examination if anything was done at that time with respect to pumping the cargo out of the barge, Garcia replied in the negative and said that he went and notified the office of the con-

[113] R. 226.
[114] R. 168.
[115] R. 168
[116] R. 168-169.
[117] R. 170.

dition of the barge and that he didn't know why pumping the cargo out of the barge was not begun. He then testified on direct examination—and we stress the materiality and importance of this testimony—as follows: [118]

"Q. If you had received orders from the office to pump the barge out were you in position to do so?

A. Yes, sir.

Q. You were thoroughly familiar with the operation necessary to pump her out?

A. Yes, sir.

Q. Was anything done that day with respect to pumping the barge?

A. No, sir."

On cross-examination Garcia testified [119] that he had seen the barge between 7:00 and 8:00 on Saturday morning because he came to work at 7:00, and that he told Miss Wertenberger in the office the condition in which he had found the barge; that he didn't see the barge again until the next day, Sunday, around 11:00; that when he went home at noon Saturday he didn't look at the barge and on his way home hadn't passed close enough to the barge to see it. When Garcia next saw the PETER B, on Sunday, the barge's bow was sunk. [120]

In this Garcia is corroborated by Miss Wertenberger (Mrs. White), whom Frieler had left in charge of Southwestern's Texas City office. Miss Wertenberger testified: [121]

"Q. You could have unloaded it [the barge] had you had instructions to do so? You had the

[118] R. 171.
[119] R. 174.
[120] R. 171.
[121] R. 134.

facilities to pump it out then and there on Saturday?

A. That's right."

Now let's see why Miss Wertenberger didn't order the cargo pumped out of the Barge PETER B:

We submit that it was because she had had absolutely no prior experience whatsoever with any marine equipment, being only a clerical employee, and because before he left Texas City Frieler had given her peremptory instructions that the Barge PETER B was not to be discharged either until he had returned or until Captain Wynne had surveyed the barge. Due to her inexperience, Miss Wertenberger did not realize that the safety of the barge and its cargo was paramount to those instructions, and therefore she let the barge sit unattended until it sank the next day (Sunday). No other conclusion is possible from the testimony, which was as follows:

Frieler testified [122] that Miss Wertenberger was "more or less my right hand man" and that when he was out of town or not in the plant she would take telephone calls and write memoranda of what happened; that she handled the bookkeeping department, took care of the invoicing and relieved him of lots of details of his work; but that she had no familiarity with barge equipment or marine equipment, being only a clerical employee.

Frieler testified that Captain Wynne, the cargo surveyor, had telephoned him about the Barge PETER B as early as Tuesday, September 19, though he didn't know how Wynne knew that the barge had sprung a leak; [123] that he advised Wynne of the details, though at that time he and Wynne had no discussion as to the dis-

[122] R. 84.
[123] R. 84.

charging of the cargo from the barge. Frieler and Wynne also must have had a telephone conversation on Wednesday, September 20, about which Frieler didn't testify, in which they did discuss discharging the barge, because on September 21 Wynne wrote Southwestern, for Frieler's attention, a letter.[124] in which he said:

> "Confirming our telephone conversation of yesterday [September 20], please be advised that I wish to attend on board the barge PETER B. prior to that barge being discharged at Texas City. Please give me as much advance notice as possible in order that I may attend without causing you any inconvenience."

Frieler then testified that he received a telegram from Mr. Kaplan to proceed to McAllen, Texas, and actually left Texas City on Thursday, September 21; that before he left he telephoned Hinkle at RTC, Houston and asked him for a report on the Barge PETER B and Hinkle told him he hadn't heard anything; that Wynne contacted him before noon on Thursday[125] and asked him when the Barge PETER B was coming in and he replied that he didn't know, and Wynne told him that he would come to Texas City and have a discussion with him about the PETER B,[126] but that nothing was then said about discharging the barge;[127] that Wynne came in his office about 4:00 on Thursday afternoon, and while they were sitting in Frieler's office Wynne told Frieler that he "must not unload—that we must not unload the barge until he [Wynne] had seen her and had taken samples of the tanks"; that since he [Frieler] "had already packed everything and was leaving to

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[124] Wynne Exhibit 3, attached to answers to interrogatories and reproduced in the transcript R. 59-60, offered jointly by Southwestern and R.T.C. R. 160-161.

[125] R. 86.

[126] R. 86.

[127] R. 86.

McAllen, I took Mr. Wynne to Miss Wertenberger's desk and I said, 'Now Miss Wertenberger, these are the instructions of Mr. Wynne; that he don't want us to unload the barge until he has seen it and taken sample of it.'" [128]

Frieler testified that he then left for Corpus Christi, having advised Miss Wertenberger where he could be reached there, and the next thing he knew about the Barge PETER B was when he was on his way back on Sunday, when he arrived in Houston close to 3:00 P.M. and was told the barge was in difficulty. By his testimony Frieler was making as light as he could of his conduct. A reference to a contemporaneous memorandum that Frieler made on September 21, 1944, and to a letter which he wrote to Mr. Kaplan on September 26, 1944, demonstrate just what Frieler had in mind better than does his testimony given in Court thirteen years later.

On September 21, 1944, Frieler wrote a memorandum [129] in which he said that in his conference with Captain Wynne in his (Frieler's) office "We came to an understanding to unload the barge on Monday on my return from McAllen, unless something else would come up", and concluded his memorandum with a quotation of the instructions that he left Miss Wertenberger upon his departure from McAllen: "Don't unload Barge until two surveyors, one for molasses and one for Barge, has seen damage. If you have their permit you can go ahead and unload."

So it appears that Frieler's instructions to Miss Wertenberger were not only not to discharge the barge

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[128] R. 86.

[129] Exhibit Respondent 1, reproduced R. 248; offered in evidence jointly by Southwestern and R.T.C., R. 160-161.

until Wynne had surveyed the cargo damage, but also that she should not discharge until a hull surveyor for the barge had also surveyed it. Neither Frieler nor Miss Wertenberger (on whose testimony we comment hereinafter) ever testified to anything about Frieler's instructions to Miss Wertenberger that the barge was not to be discharged until the hull surveyor had seen the barge.

On September 26, 1944, Frieler wrote Mr. Kaplan a letter [130] as follows, with regard to the understanding that they had reached in their conference in Frieler's office on September 21:

> "Capt. Wynne and myself came to an understanding that we would not touch the cargo till I returned from McAllen. He wanted me to make the Beaume test on the damaged Tank in order to determine if the molasses would be good enough to put into the shore tanks. I asked him to leave his home and office telephone numbers with us in order to notify him as soon as the Barge arrived."

Miss Wertenberger testified in open court on trial of this case after having reviewed the deposition which she had given previously in 1946 at Texas City,[131] eleven years before, and after having just discussed the case with libellant's proctor. She testified [132] that she was employed by Southwestern in 1942 as assistant bookkeeper and clerical worker; that she "typed up reports, the invoices and typed up the checks for the payroll" but that she didn't have anything to do with the floating equipment, its loading or discharging; that she was so employed in 1944, and that she terminated the employment in 1947. She testified that prior to this occasion,

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[130] Exhibit Libellant 11, reproduced R. 249-250; offered in evidence jointly by Southwestern and R.T.C., R. 160-161.

[131] R. 118.

[132] R. 118.

in September, 1944, Barge PETER B had previously been discharged at Texas City at least six or eight times,[133] but that her connection with these discharges had been limited to keeping account records.[134]

This was the kind of employee that Mr. Frieler left in charge of Southwestern's Texas City office when he knew that the Barge PETER B was due to arrive any day though he didn't know its position, and though he knew that the barge had sprung a leak when it was loading at Reserve, and though he had left instructions that the barge wasn't to be discharged until the cargo surveyor Captain Wynne and a hull surveyor had surveyed it.

Miss Wertenberger testified that on September 23, Saturday, when she came to work that morning she was told that the Barge PETER B had arrived.[135] She testified[136] that Joe Garcia told her the barge had arrived and "he said there was water coming in up over one corner of it" and she "went down to the docks to look at it and that's what was happening; there was water coming over one corner".

Miss Wertenberger then replied affirmatively to the question by Southwestern's proctor whether Southwestern Terminal had berthing facilities for barges and, asked how the barge had been placed in the slip, testified that the "engine room"[137] was to the inside with the bow of the barge toward the channel.[138] Miss Wertenberger was then asked what the conditions were when she went down to look at the barge, and she replied: "Well that

[133] R. 119.
[134] R. 119.
[135] R. 119.
[136] R. 120.
[137] Which was in the aft rake compartment of the barge.
[138] R. 120.

corner was down even with the water so that when the waves came, it splashed up over that corner, up about a foot or maybe a foot and a half",[139] but that the other corner was out of the water "a foot or a foot and a half, at least";[140] that Joe Garcia was with her when she went to inspect the barge, and after she had inspected it she went back to the office and placed calls for Captain Wynne and for Mr. Stovell of RTC.[141] Asked by Southwestern's proctor who Captain Wynne was, she stated that she didn't know, but before Frieler had left to go to McAllen, Captain Wynne had called at his office and they had told her that as soon as the barge arrived she was to call Captain Wynne "and let him know so that he could come down there to inspect it".[142]

Miss Wertenberger then testified[143] that she knew that there had been trouble when they loaded the barge but she didn't know what it was. She was then asked[144] about the nature of the conversation that she and Captain Wynne and Mr. Frieler had about the barge, "that is, as to when it was to be looked at; surveyed?" She replied:[145]

> "Well he was supposed to come down as soon as it was in. I was to notify him as soon as it came and docked and my understanding was that he was to come down to see the barge as soon as it arrived—as soon as I notified him."

Southwestern's proctor in his examination then switched back to the happenings of Saturday, September 23.

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139 R. 121.
140 R. 121.
141 R. 121.
142 R. 122.
143 R. 122.
144 R. 122.
145 R. 122.

Miss Wertenberger testified [146] that she telephoned Mr. Stovall and Captain Wynne and she reached Stovall first on the telephone.[147] Repeating her version of her conversation with him, Miss Wertenberger testified that she told him that the barge was in, that she had been down there to look at it and the water was coming up over a corner about a foot or a foot and a half, and that he told her to wait a minute, that he thought the captain of the DOTTIE D was in the office; that she supposed he talked to the captain for a few minutes and then he told her the captain had said the barge was in that condition when he left it "at our docks in Texas City" and was also in that condition when he picked it up at Port Arthur; that he assured her that there wasn't any danger in it; and that she told him that she had been left in charge and didn't want anything to happen and certainly didn't want it to sink, and he sort of laughed and assured her that there wasn't any danger of that; that they did not discuss whether or not the rakes of the barge had been inspected and were dry, but he assured her that there wasn't anything to be alarmed about; and that was between 8:30 and 9:00 in the morning.[148]

This is a complete resume of Miss Wertenberger's version of her conversation with Mr. Stovall. In this connection we call attention to the District Court's finding of fact No. XVI, wherein the Court states: "A clerical employee of Southwestern telephoned River's [RTC'S] Houston office, notified them of the condition of the barge, and requested that a tug be sent to pump the barge or otherwise care for it". There isn't a scintilla

[146] R. 123.

[147] On cross-examination Miss Wertenberger testified that she placed the call to Captain Wynne first but just accidentally Stovall's call came through first. R. 133.

[148] R. 123-124.

of evidence that Miss Wertenberger (or anyone else) ever requested RTC to send a tug "to pump the barge or otherwise care for it". That again is purely a figment of Southwestern's proctor's imagination embodied in its proposed findings of fact and obviously inadvertently adopted by the District Judge.

Miss Wertenberger then testified that she reached Captain Wynne on the telephone between 9:00 and 10:00 in the morning. In reply to the question whether or not she had a conversation with him about the barge, she testified:[149]

> "A. Yes, sir, I did. I told him that I had been down to see it and the condition it was and that I had called Mr. Stovall and told him the condition it was in and that—the same conversation I repeated to him that I had had with Mr. Stovall and he said that he wouldn't be down to see it until Monday with Mr. Frieler.
>
> Q. Did Captain Wynne seem alarmed at the fact that water was coming over or washing over the forward right hand corner of the barge?
>
> A. No, he didn't.
>
> Q. Did you tell him that was the condition was you [sic]?
>
> A. Yes, sir, I did.
>
> Q. Are you positive of that?
>
> A. Yes, sir."

Miss Wertenberger then gave as her excuse for not having telephoned Mr. Frieler that Stovall hadn't told her that the barge was in a dangerous condition,[150] and testified that she left the plant at noon without doing

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[149] R. 124.
[150] R. 125.

anything more about the barge; she testified that she went and looked at the barge before she left and that it was in the same condition at 12:00 noon as it had been in when she first saw it at 8:00 that morning;[151] she then testified that the next she knew about it was the next morning, Sunday, at about 9:00, when she received a telephone message at home that the barge was sinking.[152]

Miss Wertenberger testified that on receipt of information that the barge was sinking she immediately went to the plant and was there a few minutes later—that is, that would be a few minutes past 9:00. She found a Miss Gonzales and the pumpman, Garcia, there when she arrived,[153] and at that time "the water was over the top clear up to the last two valves in front of the engine room". Even then she wouldn't give any orders to start pumping the barge; she testified that she went back to the office and placed calls again to Captain Wynne and Mr. Stovall. She testified she reached Stovall first and her version of the conversation,[154] was that she told him the barge was sinking and the water was up to the last two valves in front of the engine room and she didn't know what to do with it because Joe Garcia was afraid to pump the molasses in Southwestern's shore tank because it would have salt water in it; that she didn't know what to do about it and she was in a predicament. She testified further that she told him that she had placed a call to Captain Wynne but was unable to reach him[155] and he told her[156] that when your house is burning down you don't wait for the insurance man but you call the fire

[151] R. 133.
[152] R. 126.
[153] R. 126.
[154] R. 126.
[155] R. 127.
[156] R. 127.

department to put the fire out. She testified on cross-examination that Stovall also told her "to get hold of Munez Construction Company; somebody that could raise it.[157] Nevertheless, Miss Wertenberger continued to do nothing except try to reach Captain Wynne, in which she was successful at 2:00 or 2:30 in the afternoon, and he told her to start pumping molasses overboard until he could get there in order to keep the barge from completely sinking, so that's what they did,[158] and at about 3:00 Captain Wynne appeared.

On cross-examination Miss Wertenberger also testified[159] that Southwestern never had any marine employee such as a watchman whose duty it was to watch the barges and tend to their lines, slacking them and tying them up, and notifying someone if they broke loose, and that when she left the office at noon Saturday it was then her intention to let the Barge PETER B sit there until she returned to work on Monday morning, and that's what she would have done if she had not been notified that the barge was in difficulty.

The testimony that Miss Wertenberger gave on redirect examination[160] by Southwestern's proctor is most noteworthy. She testified first that in her Saturday conversation with Mr. Stovall she had told him that she was going off work at noon Saturday and that there wouldn't be anybody there until Monday morning; that Mr. Stovall knew of her unfamiliarity with floating equipment.

Secondly, she testified with regard to and gave a complete resume of her Saturday conversation with Captain Wynne. She testified[161] that she told him that the

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157 R. 134.
158 R. 127-128.
159 R. 133.
160 R. 135 *ff.*
161 R. 136.

starboard forward corner or the right-hand forward corner of the PETER B was down and water was washing over it, but that he didn't seem alarmed about that condition; that if Captain Wynne had instructed her or recommended to her that the barge be pumped out that time it could have been done by Joe García.[162]

Thirdly, she testified that she had never seen the Barge PETER B in the same condition as it was in when she looked at it on Saturday morning.

Accepting the Frieler and Wertenberger testimony at its face value, this appears indisputably:

1. Frieler, with knowledge that the condition of the Barge PETER B was abnormal and without knowing the position of the barge, what had occurred or might occur to it during the voyage from Reserve to Texas City, or when the barge would arrive, left Texas City on other business and left in charge an employee who, however efficient she might have been as a clerical employee, admittedly knew absolutely nothing about marine equipment.

2. Captain Wynne, who had no connection with RTC, but who was Southwestern's cargo underwriters' surveyor, had instructed Southwestern not to discharge the Barge PETER B until he surveyed it, and had left instructions with Southwestern to notify him promptly on the arrival of the barge. These orders had been given Miss Wertenberger by Frieler in Captain Wynne's presence before Frieler departed, and it was Miss Wertenberger's understanding that Captain Wynne would attend the barge promptly upon its arrival.

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[162] R. 136.

3. The alleged condition of the PETER B after its arrival was known to Garcia, Southwestern's employee charged with the duty of discharging the barge, between 7:00 and 8:00 A.M., September 23. He then knew the position and the open and apparent condition of the barge and that that condition was abnormal. He was prepared then and there to discharge the cargo had he been so instructed.

4. At 9:00 A.M. on Saturday, September 23, Miss Wertenberger was advised of the presence of the barge, its position and its then open and apparent condition. She knew that something untoward had occurred at the time the barge was loaded, and went and looked at the barge and saw that it was in what she considered an abnormal condition, but did not order the barge discharged because she considered that her instructions not to discharge the barge until it had been attended by Captain Wynne overrode considerations of the safety of the barge.

5. Miss Wertenberger testified that she then talked to Stovall, an RTC office employee, and he, after consulting with the captain of the Tug DOTTIE D, assured her that the barge was safe. However, she did not rely on this assurance, but subsequently, and approximately an hour later, talked to Captain Wynne, whom she advised of the presence and the exact condition of the barge, and Captain Wynne was either too lazy or too indifferent to come and see the barge then, but put it off until Monday.

6. With full knowledge of the position and condition of the barge, Miss Wertenberger left Southwestern's plant at noon Saturday, left no watchman or anyone else in charge, and went home, intending to let the

barge sit there until Monday morning wholly unattended.

We submit that these facts make a clear case of supervening negligence on Southwestern's part, subsequent to any possible negligence of RTC's; that RTC's tying up and leaving the barge, which did not sink until more than twenty-four hours thereafter and after Southwestern had the entire day, Saturday, to discharge the barge, could not possibly have been the proximate cause of the barge's sinking with the consequent damage and cargo loss, but was only a condition of this sinking. This is taking the most favorable and charitable view possible of Southwestern's behavior, and if we examine even cursorily the other testimony in the case which has been presented by RTC, Your Honors will find that Southwestern's behavior was not even as favorable to its case as the able proctor for Southwestern has made it appear from Frieler's and Miss Wertenberger's testimony.

First, let's see what Captain Wynne had to say about this situation. Bear in mind that he had not been employed by RTC; he had been employed by Southwestern's cargo underwriters; but Southwestern wouldn't take his testimony so RTC did so and made him their witness. He testified on May 30, 1951, almost six and a half years after this occurrence and almost six years before the case was tried. At that time, asked if he had an independent recollection of this matter, he replied, "Only vaguely", and he was unable or unwilling to recall much of what happened. Shown letters that he had written and reports that he had made, he testified that he had written them or that he had made them, but that they didn't refresh his memory. However, this excerpt from Captain Wynne's survey report dated October 13, 1944, is quite pertinent and certainly interesting:[163]

[163] Exhibit Wynne 1, sent up to this Court in the original, footnote 88 *supra*, p. 42.

"At 10 A.M. on Saturday September 23, 1944 I received a call from Mr. Frieler's Secretary advising me that the barge had arrived and that it was laying low in the water forward but that it was in a safe position, and that discharging of the barge would not commence until 8 A.M. Monday September 25, 1944, when Mr. Frieler had returned from a business trip to Corpus Christi. Mr. Frieler's Secretary further advised me that she had contacted the River Terminals Company who had informed her that the barge was no lower in the water than it had when leaving Port Arthur to continue the voyage to Texas City."

It is to be noted from this statement of Captain Wynne's that Miss Wertenberger told him that she wasn't going to unload the barge until Frieler came back and that is exactly what Stovall testified that Miss Wertenberger told him.

Stovall testified by deposition at Houston, Texas, on May 30, 1951, as a witness for RTC. He testified [164] that he was then employed as Manager of Operations of Dixie Carriers, Inc., and that in September, 1944, he had been RTC's Assistant General Agent located in Houston. Stovall testified [165] that between 8:30 and 9:00 on September 23, 1944, he received a telephone call from Miss Wertenberger, who "told me about the barge 'Peter B' which had been dropped in there by the tug 'Dottie D' apparently after midnight and said the barge seemed to be in bad shape," and he told her that he couldn't understand that because he had no such report; that it happened that the DOTTIE D's captain, Captain Allemand, was in the office at the time and he asked him what the condition of the barge had been when he tied it up at Texas City,

"and he said that the barge was okeh, that it was

[164] R. 215 *ff.*
[165] R. 216.

slightly down on the head, but that he had examined the rakes, the forward rake, and there was no water in the forward rake, and that in his opinion the barge was okeh, or he wouldn't have left it there; and he thought it was okeh, and he tied it up securely and came up to Houston.[166]

Stovall then testified[167] that he repeated Captain Allemand's conversation to Miss Wertenberger but she seemed to think the barge was in bad shape, and he told her that he "didn't see any immediate danger to the barge, and I suggested that she begin discharging the barge right away", but that she replied that "Mr. Frieler was out of the city and that she had received instructions from Mr. Frieler not to discharge the barge until he came back or Mr. Wynne came down and examined the barge." He testified further[168] that he "told her to watch the barge, and my suggestion, of course, was to get the stuff out of the barge as quickly as possible. In her mind, and she was looking at the barge and there [I] was not, if it was in bad shape, I told her there wasn't but one thing to do, that was to unload it".

Stovall denied that Miss Wertenberger told him that there was water up on deck on one corner of the barge[169] and testified that if she had told him that he would have contacted Munez Construction Company or somebody else he could get to get pumps there; that he didn't have any further conversation with her that day, but on the following day, Sunday, some time after noon Miss Wertenberger called him and was real excited and said the barge was in bad shape; he asked her if she had gotten hold of Mr. Frieler and if he had made any arrangements about the

[166] R. 216.
[167] R. 216-217.
[168] R. 217.
[169] R. 217.

discharge, to which "she gave me the same answer, that she had instructions from Mr. Frieler not to discharge the cargo until Mr. Wynne came down there, and she had not been able to get hold of Mr. Wynne." [170]

Stovall then testified that he told her that if she wasn't going to unload the barge and it was in bad shape, she had better get some pumps and pump the barge out, and, as Miss Wertenberger didn't seem to know how to go about it, he called the Munez Construction Company and arranged for all the pumps he could possibly get to pump the barge out.[171]

Stovall also testified as to his recollection of a conversation with Miss Wertenberger relative to the insurance angle, and he testified that she had "mentioned that it would be an insurance deal and that Mr. Wynne was supposed to handle those matters for Frieler or for the company", and that he had told her, "If it is an insurance matter, if your home is on fire, you certainly wouldn't wait for the insurance people to come out there. You try to put the fire out, of course." [172]

On cross-examination Mr. Stovall, asked why he hadn't gotten any pumps after the Saturday conversation with Miss Wertenberger, replied "because the Captain [of the Dottie D] said there was no water in the rake. There wouldn't have been anything to pump," [173] and testified further that the captain had told him that the bottom of the head log was just below the water, but that he had checked the rakes, there was no water in them, and the barge was in the same condition as when it left Port Arthur.[174]

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[170] R. 217.
[171] R. 217.
[172] R. 218.
[173] R. 219.
[174] R. 220.

We submit that the testimony clearly demonstrates that the reason why Miss Wertenberger didn't discharge this barge was that she considered herself bound by Frieler's instructions not to do it unless and until he had returned or Captain Wynne had attended the barge. This, of course, does not alter the fact that Southwestern had the last clear chance to keep the barge from sinking, and the fact that it did not do so wholly releases RTC, regardless of what its prior conduct had been, and renders Southwestern wholly liable for the resulting loss, both as to barge and as to cargo. We submit that to hold otherwise would constitute a complete departure from the doctrine of *Crawford v. Indian Towing Company, supra.*

We submit that the foregoing clearly demonstrates that the District Court erred in holding that R.T.C. was guilty of negligent towage and in failing to hold that the towage was in all respects proper, that the sinking of the Barge PETER B was due to inherent unseaworthiness at the time it was taken in tow by R.T.C. at Reserve, Louisiana, or to a cause for which R.T.C. cannot be held accountable, and that in any event Southwestern had the last clear chance to avoid the sinking of the barge.

CONCLUSION

Accordingly we submit that the judgment of the Court of Appeals is correct and that it should be affirmed.

In the alternative, and if Your Honors should decree that the judgment of the Court of Appeals is incorrect, then this case should be remanded to the Court of Appeals for its further action and the determination of the various issues which respondent, as appellant therein, has submitted to the Court of Appeals but which that Court has not passed on.

Alternatively, and in the event that Your Honors should reverse the judgment of the Court of Appeals and not remand this case to that Court for further proceedings, then Your Honors should consider this case on its merits and reverse the decree of the District Court on the ground that it is clearly erroneous.

Respectfully submitted,

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Officially reported in 253 F. 2d 922.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16699

RIVER TERMINALS CORPORATION,
Appellant,

versus

SOUTHWESTERN SUGAR & MOLASSES COMPANY,
Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

(April 9, 1958.)

Before BORAH, TUTTLE and CAMERON, Circuit Judges.

TUTTLE, Circuit Judge: This is an appeal from a judgment for libelant for the loss of its cargo of molasses shipped by it on its own barge under tow of libelee-appellant. The libel claimed, and the trial court found, that the barge sank and its cargo was lost as a result of negligent acts of appellant in navigation or management of the tow.

The libelee asserted a defense which, if available to it, makes unnecessary consideration of the case on the merits. This defense is: Appellant was a certificated common carrier under the terms of Part III of the Inter-

state Commerce Act, 49 U.S.C.A. § 901, et seq., which was required to, and which did, file tariff schedules with the Interstate Commerce Commission, and all of whose movements of cargo must be in accordance with its certificate and must, under the statute, conform to its filed tariffs, and that the tariffs applicable to this movement relieved it from all liability for negligence or otherwise.

The trial court, in its findings of fact, said:

> "This movement, according to bill of lading issued by River on September 17, 1944, [the day the shipment commenced] was subject to River's tariff on file with the Interstate Commerce Commission, which tariff contained the following provisions:
>
> "'When shipments are transported in barges furnished by owner, shippers, consignees or parties other than the carrier, such barges and (or) cargoes will be handled at owner's risk only, whether the loss or damage is caused by negligence or otherwise.'"

Clearly, therefore, unless this provision of the tariff, which, of course, becomes a part of the contract, is to be ignored, the appellant is entitled to its benefit. As to whether the quoted provision of the tariff is valid or is void as against public policy we must at once recognize that in the recent case of *Mississippi Valley Barge Line Company v. T. L. James & Co., Inc., et al*, 5 Cir., 244 F. 2d 263, we held such a provision void and of no effect. In a case which, so far as is germane to the present issue, was identical with this one, the defense was made that both the tariff and the bill of lading (there issued several weeks after the damage) relieved the towing company of liability. Referring to *Bisso v. Inland Waterways Corp.*, 349 U.S. 85, a case involving a private contract of tow-

age, in which the parties by contract sought to relieve the tower from results of its own negligence, but which efforts the Supreme Court, in a 6-3 opinion, struck down as against public policy, this Court in an opinion participated in by the writer of this opinion, said:

> "It is sufficient to say that the validity of this claim has been definitely and conclusively settled against it in the *Bisso* case, and that, as pointed out in the opinion of the district judge below and in the briefs of the appellee here, the fact that this illegal clause is embodied in a tariff cannot make it legal."

Recognizing full well the unsettling effect of differing decisions within the same circuit in similar cases, and with every deference to the views of our colleagues who decided the *Mississippi Valley Barge Line Company* case, we deem it to be our clear duty to consider carefully what the law is on this important and far-reaching question. If we conclude that the law was incorrectly stated by us previously, it is our duty to proceed in this cause as we believe the law requires.

There is an important factor in cases of this kind that was not commented on by this Court in the earlier case. It looms so large in the consideration we now give to this case that we think it likely that failure by the Court to discuss it in the *Mississippi Valley* opinion indicates that it was overlooked. That is the rule frequently stated by the Supreme Court that "Until changed, tariffs bind both carriers and shippers with the force of law." *Lowden v. Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516, 520; *Crancer v. Lowden*, 315 U.S. 631, 635.

There is then the equally important principle, also not discussed in our earlier opinion, that when tariffs

embody terms whose initial adoption or subsequent modification involves issues of transportation policy, they ought not to be ignored, set aside, or otherwise set for naught, except after consideration by the Interstate Commerce Commission in the interests of a uniform and expert administration of the regulatory scheme laid down by the act. *United States v. Western Pacific Railway Co.*, 352 U.S. 59. An illustration in which the Supreme Court applied this principle is *General American Tank Car Corp. v. El Dorado Terminal Co.*, 308 U.S. 422, and its subsequent appearance sub. nom. *El Dorado Oil Works, et al v. United States, et al*, 328 U.S. 12. And see, for cases in which the approved procedure was followed in the first instance, *Secretary of Agriculture v. United States, et al*, 350 U.S. 162, and *Lowden v. Simonds-Shields-Lonsdale Grain Co., supra.*

For the reasons made amply clear in Part III of the Interstate Commerce Act, 49 U.S.C.A. 901, et seq. Congress has confided to the Interstate Commerce Commission the devising and controlling of a regulatory scheme over the use of water carriers in foreign and domestic commerce. Under this law[1] every common carrier (and

[1] Sections 306(a) and 306(c) of Part III of the Interstate Commerce Act (49 U.S.C.A., Section 906):

"(a) Every common carrier by water shall file with the Commission, and print, and keep open to public inspection tariffs, showing all rates, fares, charges, classifications, rules, regulations, and practices for the transportation in interstate or foreign commerce of passengers and property between places on its own route, and between such places and places on the route of any other such carrier or on the route of any common carrier by railroad or by motor vehicle, when a through route and joint rate shall have been established. Such tariffs shall plainly state the places between which property or passengers will be carried, the classification of property or passengers and, separately, all terminal charges, or other charges which the Commission shall require to be so stated, all privileges or facilities granted or allowed, and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such rates, fares, or charges, or the value of the service rendered to the passenger, shipper, or consignee.

* * * * * *

(Continued)

for the purpose of this discussion this includes towers as well as other carriers) is required to file and keep on file with the Interstate Commerce Commission its tariff "showing all rates, fares, charges, classifications, rules, regulations, and practices for the transportation of interstate or foreign commerce * * * between places on its own route," which shall plainly state among other things, "any rules or regulations which in anywise change, affect, or determine any part of the aggregate of such rates, fares, or charges, or the value of the services rendered to the passenger, shipper or consignee." No carrier is permitted, under the Act to depart, in the furnishing of carriage, from its published tariffs.

The Commission may, under the Act, permit the filed tariffs to become effective or it may suspend them temporarily and either on its own motion or on the motion of an aggrieved party, inquire into the reasonableness and legality of any such rate or charge. Upon the resolution of any such inquiry, the Commission makes its order which is binding and final unless brought in question in the manner provided in 28 U.S.C.A. §§ 2321 2323. This is by suit against the United States and the Interstate Commerce Commission in which any interested party may intervene. It is tried by a statutory three-judge district

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[1] (Continued)

"(c) No common carrier by water shall charge or demand or collect or receive a greater or less or different compensation for transportation subject to this part or for any service in connection therewith than the rates, fares, or charges specified for such transportation or such service in the tariffs lawfully in effect; and no such carrier shall refund or remit in any manner or by any device any portion of the rates, fares, or charges so specified, or extend to any person any privileges or facilities for transportation affecting the value thereof except such as are specified in its tariff: Provided, That the provisions of sections 1 (7) and 22 of Part I (which relate to transportation free and at reduced rates), together with such other provisions of such part (including penalties) as may be necessary for the enforcement of such provisions, shall apply to common carriers by water."

court from which there is a direct appeal to the Supreme Court.

In the exercise of its statutory power the Commission permitted the appellant to file its questioned tariffs which, so far as this record shows, became immediately effective. The record does not disclose that either on the objection of shipper or otherwise any complaint or other challenge has ever been made with the Commission attacking the validity of the tariffs. We are asked to hold that, regardless of the circumstances prevailing in the towing industry which caused the appellant to fix its freight charges on the basis of appellee's assuming all the risks of negligent navigation of the tower, all of which must be assumed to have caused the Commission to "approve" the tariffs and which were deemed sufficiently acceptable to shippers as to prevent them from filing a complaint thereabout, there is a public policy that outlaws the exculpatory provision as a matter of law. This it is said, follows from the Court's decision in Bisso *supra*, outlawing such a clause in a private contract of towage.

We think that when Congress has given to the Commission the extensive supervisory and regulatory power over the shipping industry with special responsibilities as to the prevention of monopolistic practices, and when the Commission permits the establishment of rates which limit the liability of carriers (presumably because there are, or may be required to be at the instance of a complaining shipper, alternative rates which place full liability on the tower) it has done so in the proper discharge of its responsibility to shipper, carrier and the public alike, and no overweening policy to invalidate one of the terms of such a tariff arises. Certainly not as a matter of law and without benefit of the Commission's initial inquiry and findings relating to the matter.

As is indicated in the concurring opinion, also expressed somewhat differently in the dissenting opinion in the *Bisso* case, the presence or absence of an overriding public policy depends on facts and circumstances that in litigation between private parties must be developed in the record:

> "It may be fairer in the long run to let the tugboat operator free himself (by contract) from his own negligence and transfer the liability to the shippers who employ his services. But the very statement of the problem raises large questions of policy on which the present records throw no light. We would have to know much more about the economics and organization of the tugboat industry than we are offered here to fashion a new rule." 349 U.S. 85, 97.

And see the discussion on the public policy aspect of the private towage case at page 117 (dissenting opinion)."

It would seem that as to common carriers, as to which Congress has given regulatory power to the Commission, the Commission's actions with respect to the terms of carriage should not be upset by the courts without their first having the factual background mentioned above first examined by the Commission and its relation to the assailed clause inquired into by it.

That there is no general public policy forbidding the exculpation of water carriers for their negligence is made amply apparent by the enactment by Congress more than half a century ago of the Harter Act,[2] which in effect relieves carriers of liability for error or fault in naviga-

[2] "§192. Limitation of liability for errors of navigation, dangers of the sea and acts of God. If the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in

(Continued)

tion or management of the vessel if they have provided a seaworthy craft. Here appellant claims to be entitled to that very protection, since it says it is such owner of a vessel as is comprehended by the Harter Act. Without deciding that issue, since we think we do not reach it,[3] but assuming for the purpose of this discussion that the terms of the Act do not apply here because this is to be considered a movement of towage rather than "transportation of property," the existence of the law is not consistent with a theory that at all times and under all circumstances it is against public policy for water carriers to be free of liability for their own negligence. We think the Supreme Court did not so decide in Bisso and we think that such exemption from liability may, within the purview of the Interstate Commerce Act, be one of the matters with which the Commission may deal in approving rates, charges and services of the carriers whose activities it has the duty to regulate. In any event we conclude that we should not hold such a part of a published tariff void until the parties have proceeded administratively to have it set aside. The method of such administrative determination is clearly set forth in *General American Tank Car Corp. v. El Dorado Terminal Co., supra*, and see *United States v. Western Pacific R. Co., supra*.

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[2] (Continued)
navigation or in the management of said vessel nor shall the vessel, her owner or owners, charterers, agent or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service." 46 U.S.C.A. §192.

[3] It is to be noted that in *Mississippi Valley Barge Line Co. v. James, supra*, on a slightly different record, we did hold that this statute was not applicable because towage rather than affreightment was involved. The Harter Act does not apply to towage and the difference here in that the trial court found as a fact that this movement was under the terms of a bill of lading subject to tariffs that were clearly adjusted to affreightment, but then concluded that this too was towage.

Nor do we think that anything in Section 920(d)[4] of Part III of the Interstate Commerce Act requires any different holding. It provides only that none of the provisions of the statute shall of themselves be held to work any change in liabilities, etc. This is not to say that the Act does not authorize the Commission to permit the parties, by their contracts of carriage, when approved by the Commission, to make such changes in their respective liabilities.

The judgment is reversed in order to afford the appellee reasonable opportunity to seek administrative action before the Commission to test the validity of the challenged provision, otherwise to give full effect to the exculpatory clause and for further proceedings not inconsistent with this opinion.

REVERSED and REMANDED.

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[4] §920. Repeals.

* * * * *

"(d) Nothing in this chapter shall be construed to affect any law of navigation, the admiralty jurisdiction of the courts of the United States, liabilities of vessels and their owners for loss or damage, or laws respecting seamen, or any other maritime law, regulation, or custom not in conflict with the provisions of this chapter." 49 U.S.C.A. §920(d).

SECTIONS 303(b), 303(d) AND 303(e) OF PART III OF THE INTERSTATE COMMERCE ACT, BEING 49 U.S.C. 903, ACT OF FEBRUARY 4, 1887, c. 104, PART III, § 303, AS ADDED SEPTEMBER 18, 1940, c. 722, TITLE II, § 201, 54 Stat. 931, AND AMENDED 1946 REORG. PLAN NO. 3, §§ 101-104, EFF. JULY 16, 1946, 11 F.R. 7876, 60 Stat. 1097, JUNE 12, 1948, c. 457, 62 Stat. 386

(b) Nothing in this chapter shall apply to the transportation by a water carrier of commodities in bulk when the cargo space of the vessel in which such commodities are transported is being used for the carrying of not more than three such commodities. This subsection shall apply only in the case of commodities in bulk which are (in accordance with the existing custom of the trade in the handling and transportation of such commodities as of June 1, 1939) loaded and carried without wrappers or containers and received and delivered by the carrier without transportation mark or count. For the purposes of this subsection two or more vessels while navigated as a unit shall be considered to be a single vessel. This subsection shall not apply to transportation subject, at the time this chapter takes effect, to the provisions of the Intercoastal Shipping Act, 1933, as amended.

* * * * *

(d) Nothing in this chapter shall apply to the transportation by water of liquid cargoes in bulk in tank vessels designed for use exclusively in such service and certified under regulations approved by the Commandant of the Coast Guard pursuant to the provisions of section 391a of Title 46.

* * * * *

(e) (1) Notwithstanding any provision of this chap-

ter the Commission may, by order, from time to time, upon application, or upon its own initiative without application, exempt from the requirements of this chapter the transportation of passengers between points in the United States by way of a foreign port or ports, upon a finding that application of such requirements thereto is not necessary to carry out the national transportation policy declared in this chapter and chapters 1, 8 and 13 of this title.

(2) It is declared to be the policy of Congress to exclude from the provisions of this chapter, in addition to the transportation otherwise excluded under this section, transportation by contract carriers by water which, by reason of the inherent nature of the commodities transported; their requirement of special equipment or their shipment in bulk, is not actually and substantially competitive with transportation by any common carrier subject to this chapter or chapter 1 or 8 of this title. Upon application of a carrier, made in such manner and form as the Commission may by regulations prescribe, the Commission shall, subject to such reasonable conditions and limitations as the Commission may prescribe, by order exempt from the provisions of this chapter such of the transportation engaged in by such carrier as it finds necessary to carry out the policy above declared. A carrier (other than a carrier subject, at the time this chapter takes effect, to the provisions of the Intercoastal Shipping Act, 1933, as amended) making such application prior to January 1, 1941, shall be exempt from the provisions of this chapter until a final determination has been made upon such application if such carrier or a predecessor in interest was in bona fide operation as a contract carrier by water on January 1, 1940, over the route or routes or between the ports with respect to which application is made and has so operated since that time

(or, if engaged in furnishing seasonal service only, was in bona fide operation during the seasonal period, prior to or including such date, for operations of the character in question) except, in either event, for interruptions of service over which such carrier or its predecessor in interest had no control.

SECTIONS 305(a) AND 305(c) OF PART III OF THE INTERSTATE COMMERCE ACT, BEING 49 U.S.C. 905(b); ACT OF FEBRUARY 4, 1887, c. 104, PART III, § 305, AS ADDED SEPTEMBER 18, 1940, c. 722, TITLE II, § 201, 54 Stat. 934

(a) It shall be the duty of common carriers by water to establish reasonable through routes with other such carriers and with common carriers by railroad, for the transportation of persons or property, and just and reasonable rates, fares, charges, and classifications applicable thereto, and to provide reasonable facilities for operating such through routes, and to make reasonable rules and regulations with respect to their operation and providing for reasonable compensation to those entitled thereto. Common carriers by water may establish reasonable through routes and rates, fares, charges, and classifications applicable thereto with common carriers by motor vehicle. In the case of joint rates, fares, or charges it shall be the duty of the carriers parties thereto to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such carriers.

* * * * *

(c) It shall be unlawful for any common carrier by water to make, give, or cause any undue or unreasonable

preference or advantage to any particular person, port, port district, gateway, transit point, locality, region, district, territory, or description of traffic in any respect whatsoever; or to subject any particular person, port, port district, gateway, transit point, locality, region, district, territory, or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever; *Provided*, That this subsection shall not be construed to apply to discriminations, prejudice, or disadvantage to the traffic of any other carrier of whatever description. Differences in the classifications, rates, fares, charges, rules, regulations, and practices of a water carrier in respect of water transportation from those in effect by a rail carrier with respect to rail transportation shall not be deemed to constitute unjust discrimination, prejudice, or disadvantage, or an unfair or destructive competitive practice, within the meaning of any provision of this Act.

SECTIONS 306(a), 306(c) AND 306(d) OF PART III OF THE INTERSTATE COMMERCE ACT, BEING 49 U.S.C. 906, ACT OF FEBRUARY 4, 1887, c. 104, PART III, § 306, AS ADDED SEPTEMBER 18, 1940, c. 722, TITLE II, § 201, 54 Stat. 935

(a) Every common carrier by water shall file with the Commission, and print, and keep open to public inspection tariffs showing all rates, fares, charges, classifications, rules, regulations, and practices for the transportation in interstate or foreign commerce of passengers and property between places on its own route, and between such places and places on the route of any other such carrier or on the route of any common carrier by railroad or by motor vehicle, when a through route and

joint rate shall have been established. Such tariffs shall plainly state the places between which property or passengers will be carried, the classification of property or passengers and, separately, all terminal charges, or other charges which the Commission shall require to be so stated, all privileges or facilities granted or allowed, and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such rates, fares, or charges, or the value of the service rendered to the passenger, shipper, or consignee.

* * * * *

* * * * *

(c) No common carrier by water shall charge or demand or collect or receive a greater or less or different compensation for transportation subject to this part or for any service in connection therewith than the rates, fares, or charges specified for such transportation or such service in the tariffs lawfully in effect; and no such carrier shall refund or remit in any manner or by any device any portion of the rates, fares, or charges so specified, or extend to any person any privileges or facilities for transportation affecting the value thereof except such as are specified in its tariff: Provided, That the provisions of section 1 (7) and 22 of part I (which relate to transportation free and at reduced rates), together with such other provisions of such part (including penalties) as may be necessary for the enforcement of such provisions, shall apply to common carriers by water.

* * * * *

(d) No common carrier by water, unless otherwise provided by this part, shall engage in transportation subject to this part unless the rates, fares, and charges upon

which the same are transported by said carrier have been filed and published in accordance with the provisions of this part. No change shall be made in any rate, fare, charge, classification, regulation, or practice specified in any effective tariff of a common carrier by water except after thirty days' notice of the proposed change filed and posted in accordance with this section. Such notice shall plainly state the change proposed to be made and the time when such change will take effect. The Commission may, in its discretion and for good cause shown, allow changes upon notice less than that herein specified, or modify the requirements of this section, either in particular instances or by general order applicable to special circumstances or conditions.

SECTION 314 OF PART III OF THE INTERSTATE COMMERCE ACT, BEING 49 U.S.C. 914, ACT OF FEBRUARY 4, 1887, c. 104, PART III, SECTION 314, AS ADDED SEPTEMBER 18, 1940, c. 722, TITLE II, SECTION 201, 54 Stat. 945

If the owner of property transported under this part directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be published in tariffs or schedules filed in the manner provided in this part and shall be no more than is just and reasonable; and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order.

SECTION 320(d) OF PART III OF THE INTERSTATE COMMERCE ACT, BEING 49 U.S.C. 920(d), ACT OF FEBRUARY 4, 1887, c. 104, PART III, § 320, AS ADDED SEPTEMBER 18, 1940, c. 722, TITLE II, § 201, 54 Stat. 950

(d) Nothing in this chapter shall be construed to affect any law of navigation, the admiralty jurisdiction of the courts of the United States, liabilities of vessels and their owners for loss or damage, or laws respecting seamen, or any other maritime law, regulation, or custom not in conflict with the provisions of this chapter.

REVISED STATUTE 4282, BEING 46 U.S.C. 182, ACT OF MARCH 3, 1851, c. 43, § 1, 9 Stat. 635

LOSS BY FIRE

No owner of any vessel shall be liable to answer for or make good to any person any loss or damage, which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner.

SECTION 1 OF THE HARTER ACT, BEING 46 U.S.C. 190, ACT OF FEBRUARY 13, 1893, c. 105, § 1, 27 Stat. 445

Stipulations relieving from liability for negligence. It shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping

document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect.

SECTION 2 OF THE HARTER ACT, BEING 46 U.S.C. 191, ACT OF FEBRUARY 13, 1893, c. 105, § 1, 27 Stat. 445

Stipulation relieving from exercise of due diligence in equipping vessels. It shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel to exercise due diligence [to] properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened weakened, or avoided.

SECTION 3 OF THE HARTER ACT, BEING 46 U.S.C. 192, ACT OF FEBRUARY 13, 1893, c. 105, § 3, 27 Stat. 445

Limitation of liability for errors of navigation, dangers of the sea and acts of God. If the owner of any

vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service.

SECTIONS 1 AND 2 OF THE CARRIAGE OF GOODS BY SEA ACT, BEING 46 U.S.C. 1304, ACT OF APRIL 16, 1936, c. 229, § 4, 49 Stat. 1210

Rights and immunities of carrier and ship—Unseaworthiness

(1) Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied, and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of paragraph (1)

of section 1303 of this title. Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section.

Uncontrollable causes of loss

(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship;

(b) Fire, unless caused by the actual fault or privity of the carrier;

(c) Perils, dangers, and accidents of the sea or other navigable waters;

(d) Act of God;

(e) Act of war;

(f) Act of public enemies;

(g) Arrest or restraint of princes, rulers, or people, or seizure under legal process;

(h) Quarantine restrictions;

(i) Act or omission of the shipper or owner of the goods, his agent or representative;

(j) Strikes or lockouts or stoppage or restraint of labor from whatever cause, whether partial or general: *Provided*, That nothing herein contained shall be construed to relieve a carrier from responsibility for the carrier's own acts;

(k) Riots and civil commotions;

(l) Saving or attempting to save life or property at sea;

(m) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods;

(n) Insufficiency of packing;

(o) Insufficiency or inadequacy of marks;

(p) Latent defects not discoverable by due diligence; and

(q) Any other cause arising without the actual fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

ITEMS 580, 640 AND 896(g) OF RIVER TERMINALS CORPORATION'S TARIFF I.C.C. NO. A-9

ITEM NO. 580

Carriers' Non-Liability

* * * * *

"When shipments are transported in barges furnished by owners, shippers, consignees or parties other than the Carriers parties to this Tariff, such barges and (or) cargoes will be handled at owner's risk only, whether loss or damage is caused by negligence or otherwise."

* * * * *

"ITEM NO. 640

"Furnishing of and Handling Barges

"The carriers parties to this Tariff will furnish open or closed type cargo barges, depending on character of material to be transported. TANK BARGES WILL NOT BE FURNISHED.

* * * * *

* * * * *

"Presentation of a shipment in barge furnished by shipper, consignee or owner for movement on rates named herein shall constitute a guarantee to the Carriers parties to this Tariff that such barge is seaworthy and barge and cargo are in suitable condition for voyage in prospect. However, the Carriers parties to this Tariff, despite such implied guarantee, shall be privileged to refuse acceptance if the barge is in apparent bad order. If unfitness of barge or cargo is discovered after voyage has begun, then the Carriers parties to this Tariff shall be privileged to deliver such barge at nearest landing for holding at expense of shipper, consignee or owner, in which event freight charges shall be adjusted in conformity with rates provided in this Tariff for distance barge was actually moved by the Carriers parties to this Tariff. If deficiencies are remedied by shipper in the judgment of the Carriers parties to this Tariff, shipper may reforward the barge to ultimate destination at through rate applicable without additional charge for the stop over for repairs.

* * * * * *

* * * * * *

"ITEM NO. 896(g)

"Actual Placement—Actual placement of barge or barges is delivery of the barge or barges by the carrier to the point of loading or unloading designated by Shipper, consignee or their agents".

[Exhibit Libellant 15]

WHEREAS, on September 24, 1944, the barge "ABL-109" now called the "PETER B" owned by the INTERNATIONAL TRANSPORTATION CORPORATION was insured by the CONTINENTAL INSURANCE COM-

PANY OF THE CITY OF NEW YORK under their certain hull policy, in the sum of $20,000.00 which policy attached November 11, 1943 and expired on November 11, 1944, and

WHEREAS, under date of September 24, 1944, the barge "Peter B" sank while moored to a dock at Texas City, Texas, and

WHEREAS, the INTERNATIONAL TRANSPORTATION CORPORATION, owners of said barge "Peter B", in the raising and repairing of the barge "Peter B" as a result of said sinking expended the sum of approximately $15,000.00, and

WHEREAS, the INTERNATIONAL TRANSPORTATION CORPORATION has made claim against the CONTINENTAL INSURANCE COMPANY OF THE CITY OF NEW YORK under said policy to recover back the amount so expended as being due it under said policy, but for which claim the CONTINENTAL INSURANCE COMPANY OF THE CITY OF NEW YORK does not admit liability,

NOW THEREFORE without either party receeding from the position taken by them and solely in a spirit of compromise it is stipulated and agreed between them as follows:

(1) That in consideration of the payment to the INTERNATIONAL TRANSPORTATION CORPORATION by the CONTINENTAL INSURANCE COMPANY OF THE CITY OF NEW YORK of the sum of $7,500.00 the receipt of which is hereby acknowledged the INTERNATIONAL TRANSPORTATION CORPORATION hereby declares that it accepts said sum in full settlement,

satisfaction and discharged by compromise of any and all claims, whether in equity, admiralty, or law, which it has had, now has, or may hereinafter have against the CONTINENTAL INSURANCE COMPANY OF THE CITY OF NEW YORK, under the aforesaid policy issued by it as herein stated, growing out of or arising as a result of the aforesaid sinking of the barge "Peter B" or, "A B L-109", and on September 24, 1944,

(2) That as a further consideration of this settlement the CONTINENTAL INSURANCE COMPANY OF THE CITY OF NEW YORK hereby agrees to and does hereby waive subrogation in any sum or to any extent as to the rights of the INTERNATIONAL TRANSPORTATION CORPORATION against the River Terminals Corporation and/or its tug and/or tugs that towed the barge "Peter B" from Reserve, Louisiana, and delivered her to Texas City, on September 23, 1944.

This done and executed in quadruplicate original in the City of New Orleans, on this 6th day of January, 1945, in the presence of the undersigned competent witnesses.

CONTINENTAL INSURANCE COMPANY OF THE CITY OF NEW YORK
By /s/ J. K. Sadler

WITNESSES:
/s/ Edw. F. Bowman, Jr.
/s/ Denise Freeman

INTERNATIONAL TRANSPORTATION COMPANY
By /s/ John D., M. A.,
Edwin H. Grace
Attorney in law and in Fact

WITNESSES:
/s/ Edwin H. Grace
/s/ Shirley Schexnaydre
TRIPLICATE ORIGINAL

TEXAS NAUTICAL SCHOOL
CAPT. A. A. COLBURY, Principal
YACHTING, PILOTAGE, NAUTICAL ASTRONOMY, NAVIGATION, CELESTIAL AND TERRESTRIAL

Compass Adjusting & Repairs
Nautical Instruments

516 Cotton Exchange Building
Phone Charter 4-2439
HOUSTON, TEXAS

Port of Houston, Texas
October 10, 1944

TO WHOM IT MAY CONCERN:

RE: REPORT OF SURVEY, BARGE "PETER B"

Acting at the request of the International Transportation Corporation, owners of the subject barge, this undersigned surveyor did on October 12, 1944, attend the barge while upon drydock at Houston, Texas, for the purpose of ascertaining and reporting upon the condition of the shell plating.

Upon examination: Found:

Bottom plating including knuckle good.

Upper strake plating port and starboard sides good.

Rake plating good.

Heavy scale present on lower strake plating port and starboard sides of barge from the light load line up for a distance of 4' and for the full length of the barge.

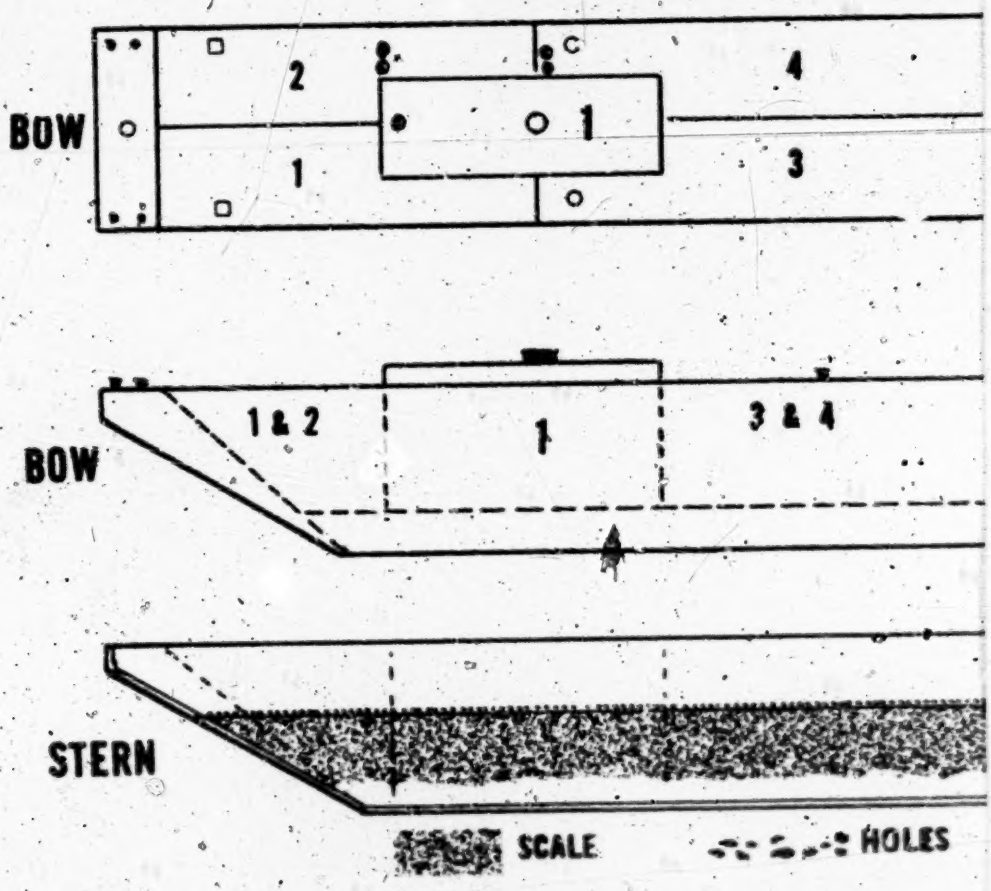
Portions of the scale had been removed from the side plating of #2 tank starboard side exposing several small pinholes in the plate over an area of 48" x 21". This wasted section of the plating is being renewed, and in the opinion of this undersigned surveyor when completed the barge will be in a satisfactory seaworthy condition for present service.

This survey was made without prejudice.

/s/ A. A. Colbury

Capt. A. A. Colbury
Surveyor

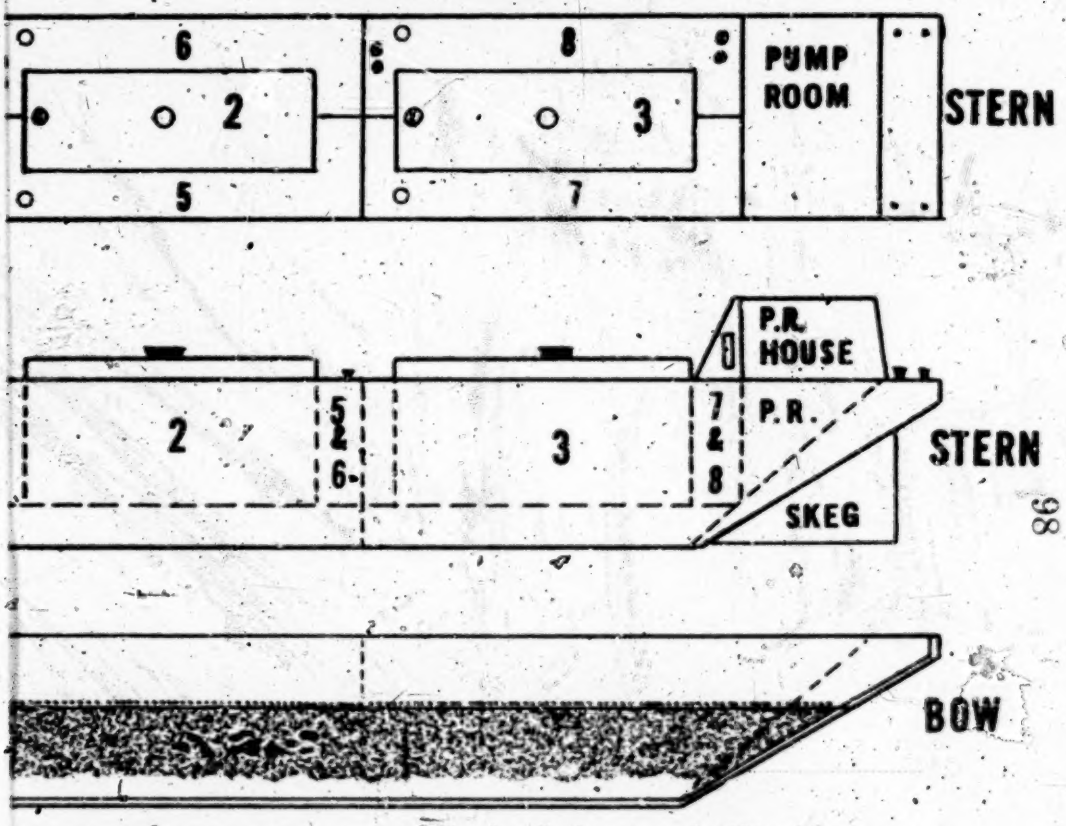
HOPPER TYPE BARGE
Size 175′ x 26′4″ x 11′.



Found:

1. Deck set down and thirty foot of plate e
2. Deck plating torn in way of ends of cly
3. All eleven valve stems bent and packing
4. All manhole covers—none water tight a
5. Five Salvage Holes in Deck 8″ diamete

BARGE "PETER B"
Converted into Oil Barge



eavy scale present over all shaded area both sides.
ull above and below—good. HBL

es separated by welding having pulled apart.
er tanks.
issing from glands.
holding down bolts and dogs froze.

[Sketch of Exhibit Lambdin 1]